Record of Determinations –
Medical Practitioners Tribunal

PUBLIC RECORD

Please note: Dr Freeman appealed decisions of this Tribunal. On 16 January 2023, the High Court dismissed Dr Freeman's appeal.

Dr Freeman's name has therefore been erased from the Medical Register.

Dates: 29/10/2019 – 17/12/2019
03/09/2020
05/10/2020 – 26/11/2020
22/01/2021 – 27/01/2021
06/02/2021
12/02/2021
15/02/2021 – 09/03/2021
12/03/2021
17/03/2021 – 19/03/2021

Medical Practitioner's name:	Dr Richard FREEMAN
GMC reference number:	2854524
Primary medical qualification:	MB ChB 1984 University of Manchester
Type of case New - Misconduct	**Outcome on impairment** Impaired

Summary of outcome
Erasure
Immediate order imposed

Tribunal:

Legally Qualified Chair	Mr Neil Dalton
Lay Tribunal Member:	Mr Andrew Waite
Medical Tribunal Member:	Dr Leigh-Anne Hill

Tribunal Clerk:	Ms Jennifer Coakley (29/10/2019 – 06/12/2019) Ms Angela Carney (10/12/2019 & 13/12/2019) Mr Sewa Singh (10/12/2019)

	Ms Zaheda Razvi (09/12/2019, 11/12/2019 – 12/12/2019, 16/12/2019 & 17/12/2019) Ms Esther Morton (03/09/2020) Ms Lauren Duffy (05/10/2020 – 19/03/2020)

Attendance and Representation:

Medical Practitioner:	Present and represented (29/10/2019 – 12/11/2019 & 06/12/2019 & 05/10/2020 – 26/11/2020 & 06/02/2021 & 12/02/2021) Not present and represented (14/11/2019 – 28/11/2019 & 09/12/2019 to 17/12/2019 & 03/09/2020 & 22/01/2021 – 27/01/2021 & 12/03/2021 & 17/03/2021-19/03/2021)
Medical Practitioner's Representative:	Ms Mary O'Rourke, QC, instructed by Hempsons Solicitors
GMC Representative:	Mr Simon Jackson, QC

Attendance of Press / Public

In accordance with Rule 41 of the General Medical Council (Fitness to Practise) Rules 2004 the hearing was held partly in public and partly in private.

Overarching Objective

Throughout the decision making process the tribunal has borne in mind the statutory overarching objective as set out in s1 Medical Act 1983 (the 1983 Act) to protect, promote and maintain the health, safety and well-being of the public, to promote and maintain public confidence in the medical profession, and to promote and maintain proper professional standards and conduct for members of that profession.

Determination on Facts - 12/03/2021

Background

1. Dr Freeman qualified in 1984 and, prior to the events which are the subject of the hearing, he worked as a General Practitioner ('GP') in two GP practices.

2. From January 1996 to August 2008, Dr Freeman was a GP with a special interest in erectile dysfunction.

3. In March 1999, Dr Freeman was granted a Diploma in Sports Medicine and between 2000 and 2008 he worked for Bolton Wanderers Football Club, initially on a part-time basis with the Youth Academy and then on a full-time basis as Team Doctor for the club.

4. In June 2003, Dr Freeman was made a Fellow of the Faculty of Sports and Exercise of the Royal College of Surgeons in Ireland.

5. In September 2007, Dr Freeman was made a Fellow of the Faculty of Sport and Exercise Medicine of the UK Royal Colleges. Between 2008 and 2010, Dr Freeman worked as a Clinical Director and a musculoskeletal physician for the Musculoskeletal Service within a Primary Care Trust. He also worked as a specialist in Sports Medicine.

6. At the time of the events, Dr Freeman was practising as a Team Doctor for British Cycling; the National Governing Body for cycle sport in Great Britain. He worked in this role from 2010 to 2015 and then, from October 2016 to October 2017, as its Head of Medicine. Dr Freeman was also contracted, in parallel with his work at British Cycling, as the Lead Team Doctor for the professional cycling team Tour Racing (also known as Team Sky) from around January 2010 to 2016.

7. Initial concerns about Dr Freeman were brought to the attention of the General Medical Council ('GMC') following a series of newspaper articles published in or around October 2016. Subsequently, on 7 April 2017, the UK Anti-Doping agency ('UKAD') made a formal referral to the GMC.

8. The allegations relate to Dr Freeman's ordering of a banned substance Testogel (a gel preparation containing the banned steroid testosterone) knowing or believing that it was to be administered to an athlete to improve athletic performance, together with matters of dishonesty relating to the ordering of the Testogel to conceal what had been done. Furthermore, the allegations relate to clinical concerns with regards to prescribing for non-riders, and concerns with his record management.

The Outcome of Applications Made during the Facts Stage

9. The Tribunal granted an application made by Ms Mary O'Rourke, QC, on behalf of Dr Freeman, that Dr Freeman be treated as a vulnerable witness and be granted reasonable adjustments during the hearing. The Tribunal's full decision on the application is included at Annex A.

10. The Tribunal granted an application made by Mr Simon Jackson, QC, on behalf of the GMC, pursuant to Rule 17(6) of the General Medical Council (Fitness to Practise Rules) 2004 as amended ('the Rules'), to amend paragraphs 12 and 13 of the Allegation. The Tribunal's full decision on the application is included at Annex B.

11. The Tribunal granted an application made by Mr Jackson, pursuant to Rule 41(2) of the Rules, that parts of Dr A's evidence be heard in private. The Tribunal's full determination on the application is included at Annex C.

12. The Tribunal granted an application made by Ms O'Rourke for matters relating to Dr Freeman's health be heard in public session. The Tribunal's full decision on the application is included at Annex D.

13. The Tribunal granted an application made by Mr Jackson, pursuant to Rule 41(2) of the Rules, that parts of Mr D's evidence be heard in private. The Tribunal's full determination on the application is included at Annex E.

14. The Tribunal received an application made by Mr Jackson, pursuant to Rule 34(13) of the Rules, for the oral evidence of Dr F to be heard via video link. Ms O'Rourke did not oppose the application, and the Tribunal determined that it was in the interests of justice to grant the application.

15. The Tribunal granted an application made by Mr Jackson, pursuant to Rule 34(1) of the Rules, to admit a redacted transcript of Dr Freeman's recorded interview with Mr E (Sports Editor at the BBC) which took place in July 2018. The Tribunal's full determination on the application is included at Annex F.

16. The Tribunal refused an application from Ms O'Rourke for Mr D's evidence to be excluded. The Tribunal's full determination on the application is included at Annex G.

17. The Tribunal granted an application from Ms O'Rourke, in relation to her providing context and background to the Tribunal in respect of the questions that she had proposed to put to Mr D during his cross-examination. The Tribunal's full determination on the application is included at Annex G2.

18. At the end of the GMC's case, an application was made by Ms O'Rourke, of 'no case to answer', pursuant to rule 17(2)(g) of the Rules. The Tribunal rejected Ms O'Rourke's application. The Tribunal's full decision on the application is included at Annex H.

19. On 17 December 2019, Ms O'Rourke applied for an adjournment on the basis that Dr Freeman's health had declined. The hearing adjourned subject to Rule 29(2) of the Rules. The Tribunal issued various directions. Its determination is included at Annex I.

20. On 13 August 2020 Mr Simon Jackson applied for further case management directions. The Tribunal's full decision on this application can be found at Annex J.

21. During Dr Freeman's oral evidence, Mr Jackson, made an application under Rule 41 of the Rules for Dr Freeman's evidence relating to the health of riders to be heard in private. The Tribunal refused this application. The Tribunal's full decision on this application can be found at Annex K.

22. On 3 November 2020, Mr Jackson made an application that he should be permitted to put additional documentation to Dr Freeman during cross-examination. Ms O'Rourke opposed the application and made an application that no additional 'new' documentation should be put to Dr Freeman in cross-examination. The Tribunal's full decision on this application can be found at Annex L.

23. On 3 November 2020, following the announcement of further national restrictions due to the covid-19 pandemic, the Tribunal determined that the hearing would continue as a 'hybrid' hearing. Following the conclusion of Dr Freeman's evidence, the hearing would proceed as a virtual hearing. The Tribunal's determination can be found at Annex M.

24. On 18 November 2020, the Tribunal considered Mr Jackson's application that he should be permitted to put additional documentation before the Tribunal. The Tribunal determined to refuse this application. Its determination can be found at Annex N.

25. On 22 January 2021, Ms O'Rourke applied for an adjournment on the basis that Dr Freeman was unable to attend the hearing to listen to the closing submissions due to work commitments. The Tribunal refused this application. Its determination can be found at Annex O.

The Allegation and the Doctor's Response

26. The Allegation made against Dr Freeman is as follows:

Order of a banned substance

1 On 16 May 2011, you ordered for delivery from Fit4Sport Limited to the Manchester Velodrome 30 sachets of Testogel ('the Order'). **Admitted and found proved**

2 At the time of order referred to in paragraph 1 above, Testogel was (and remains) prohibited on the World Anti-Doping Agency List of Prohibited Substances and Methods. **Admitted and found proved**

3 On 18 May 2011, when the Order had been received at Manchester Velodrome, you advised Dr A and Mr B that:

a you had not made the Order; **Admitted and found proved**

b the Order had been sent in error; **Admitted and found proved**

4 The statements you made as outlined at Paragraph 3 above:

a were untrue; **Admitted and found proved**

b you knew to be untrue. **Admitted and found proved**

5 On a date in October 2011 you contacted Ms C at Fit4Sport Limited and asked her to send you written confirmation ('the Email') which stated that the Order:

a had been sent in error by Fit4Sport Limited; **Admitted and found proved**

b had been returned to Fit4Sport Limited; **Admitted and found proved**

c will be destroyed by Fit4Sport Limited; **Admitted and found proved**

6 When you asked Ms C to send the Email, you knew that the Order had not been:

a sent in error by Fit4Sport Limited; **Admitted and found proved**

b returned to Fit4Sport Limited; **Admitted and found proved**

c destroyed by Fit4Sport Limited; **Admitted and found proved**

7 On a date in October 2011, you showed the Email to Dr A and Mr B to evidence that the Order had been:

a sent in error by Fit4Sport Limited; **Admitted and found proved**

b returned to Fit4Sport Limited; **Admitted and found proved**

c (or would be) destroyed by Fit4Sport Limited. **Admitted and found proved**

8 When you showed the Email to Dr A and Mr B you knew that the content of the Email was untrue. **Admitted and found proved**

9 During an interview with UK Anti-Doping on 17 February 2017, you stated that the Testogel had been:

a ordered for a non-athlete member of staff; **Admitted and found proved**

b returned to Fit4Sport Limited. **Admitted and found proved**

10 The comments as outlined at Paragraph 9 above:

a were untrue; **Admitted and found proved in relation to 9b. To be determined in relation to 9a**

b you knew to be untrue. **Admitted and found proved in relation to 9b. To be determined in relation to 9a**

11 Your conduct as outlined at paragraphs 3, 5, 7 and 9 above was dishonest by reasons of paragraphs 4, 6, 8 and 10. **Admitted and found proved in relation to 3, 5, 7 and 9b. To be determined in relation to 9a**

12 ~~Your motive for placing the Order was to obtain Testogel to administer to an athlete to improve their athletic performance.~~

<u>You placed the Order and obtained the Testogel:</u>

<u>a when you knew it was not clinically indicated for the non-athlete member of staff as described at paragraph 9a above;</u> **Amended under Rule 17(6). To be determined**

b knowing or believing it was to be administered to an athlete to improve their athletic performance. **Amended under Rule 17(6). To be determined**

13 The motive for your actions as outlined at Paragraphs 3 to 11 (inclusive) above was to conceal your ~~motive~~ conduct as outlined at paragraph 12 above. **Amended under Rule 17(6). To be determined**

Clinical concerns

14 When Team Doctor for athletes at British Cycling Federation ('BC') and Tour Racing / Team Sky ('Team Sky'), you provided medical treatment that did not constitute first aid to non –athlete members of staff:

a without access to the medical records for those members of staff you treated; **Admitted and found proved**

b when they should instead have been referred to their general practitioner. **Admitted and found proved**

15 You failed to inform Patient A's GP of:

a what medication you had prescribed to Patient A; **Admitted and found proved**

b the reasons for prescribing medication to Patient A. **Admitted and found proved**

16 You failed to inform Patient B's GP of:

a what medication you had prescribed to Patient B; **Admitted and found proved**

b the reasons for prescribing medication to Patient B. **Admitted and found proved**

17 You failed to inform Patient C's GP of:

a what medication you had prescribed Patient C; **Admitted and found proved**

b the reasons for prescribing the medication to Patient C. **Admitted and found proved**

Record management

18 Your role as team doctor at BC and Team Sky required you to use electronic medical record keeping software (namely Performance Data Management System at BC and Drop Box at Team Sky) so that treating physicians always had access to relevant medical information of Team Sky and BC athletes anywhere in the world. **Admitted and found proved**

19 You failed to maintain an adequate record management system in that you failed to:

a implement an adequate medicine management policy, in that you did not adequately record details of stored drugs, including:

i stock checks; **Admitted and found proved**

ii medicine use; **Admitted and found proved**

iii expiry dates; **Admitted and found proved**

iv dosages; **Admitted and found proved**

v quantity; **Admitted and found proved**

vi batch numbers; **Admitted and found proved**

b record details of drugs once prescribed, including:

i start date of treatment; **Admitted and found proved**

ii dose; **Admitted and found proved**

iii quantity **Admitted and found proved**

iv batch number; **Admitted and found proved**

c consistently record patient records on:

i the Performance Data Management System at BC; **Admitted and found proved**

ii in the alternative to 19.c.i, in hard copy form. **Admitted and found proved**

d record on patient records or elsewhere medication you had:

i ordered; **Admitted and found proved**

ii stored; **Admitted and found proved**

iii prescribed. **Admitted and found proved**

e maintain a consistent and organised approach to the storage of medical records in that when you did create records you stored them:

i on a number of different laptops; **Admitted and found proved**

ii in hard copy form in piles of loose paper. **Admitted and found proved**

20 Your management of prescription-only medication ('POM') was inappropriate in that you failed to:

a issue a prescription for relevant medication; **Admitted and found proved**

b keep an adequate record of stored POM; **Admitted and found proved**

c keep an adequate record of dispensed POM. **Admitted and found proved**

21 On the evening of 27 / 28 August 2014, a British Cycling laptop containing records of a professional cyclist ('the Laptop') was stolen from you. **Admitted and found proved**

22 You failed to ensure that the records on the Laptop could be retrieved in that you:

a did not back up the records:

i electronically; **Admitted and found proved**

ii in hard copy form. **Admitted and found proved**

b stored the records in a manner only accessible to you.
Admitted and found proved

And that by reason of the matters set out above your fitness to practise is impaired because of your misconduct. **To be determined**

The Admitted Facts

27. At the outset of these proceedings, Dr Freeman, through his representative, Ms O'Rourke made admissions to some paragraphs and sub-paragraphs of the Allegation, as set out above, in accordance with Rule 17(2)(d) of the Rules. In accordance with Rule 17(2)(e) of the Rules, the Tribunal announced these paragraphs and sub-paragraphs of the Allegation as admitted and found proved.

The Facts to be Determined

28. In light of Dr Freeman's response to the Allegation made against him, the Tribunal is required to determine whether, during an interview with UKAD on 17 February 2017, Dr Freeman made an untrue statement about the Testogel being ordered for a non-athlete member of staff. It will also determine whether he knew it to be untrue, and whether his conduct in this regard was dishonest.

29. It will determine whether, when Dr Freeman placed the order and obtained the Testogel, he knew at the time of placing the order that it was not clinically indicated for the non-athlete member of staff.

30. Further, it will determine whether he placed the order and obtained the Testogel knowing or believing that it was to be administered to an athlete to improve their athletic performance.

31. It will also determine whether the motive for Dr Freeman's actions in paragraphs 3-11 of the Allegation was to conceal his conduct in paragraph 12.

Factual Witness Evidence

32. The Tribunal received evidence on behalf of the GMC from the following witnesses:

- Mr D, former Head Coach at British Cycling and Team Sky, in person;
- Dr A, former Head of Medicine and Team Psychiatrist at British Cycling and Psychiatrist at Team Sky on a consultancy basis, in person;
- Mr B, former Head of Physiotherapy at British Cycling and former Consultant Physiotherapist for Team Sky, in person.

33. The Tribunal also received evidence on behalf of the GMC in the form of witness statements from the following witnesses who were not called to give oral evidence:

- Ms G, Managing Director of Fit4Sport;
- Ms C, Office Manager at Fit4Sport;
- Dr H, UKAD Investigator;
- Mr I, qualified solicitor and Director of Litigation Services and Lead Investigator at external investigation company Vista;
- Mr J, former Intelligence Analyst for UKAD;
- Dr K, Patient A's General Practitioner;
- Dr L, Consultant Rheumatologist and Medical Expert for the Vista investigation;
- Dr M, Patient B's and Patient C's General Practitioner;
- Ms N, former Personal Assistant to Mr D;
- Dr O, Consultant in sports and exercise medicine for the English Institute of Sport and Team Doctor at British Cycling;
- Dr P, Director of Medical Services at the English Institute of Sport.

34. Dr Freeman provided three witness statements specifically for this hearing. The first dated 24 September 2019 and the second dated 28 November 2019. Dr Freeman provided a further undated statement that was given to the Tribunal in October 2020. He also gave oral evidence at the hearing. Sitting behind this evidence was a number of historical accounts given to UKAD and others.

35. In addition, the Tribunal received evidence from the following witnesses on Dr Freeman's behalf:

- Mr Q, the father of the former professional cyclist, Ms R, by video-link;
- Mr S, retired cyclist and former team-mate of Mr D by telephone.

Expert Witness Evidence

36. The Tribunal received evidence from a number of expert witnesses.

37. Professor T was called by the GMC. He provided two expert reports, dated 30 April 2018 and 27 August 2019, and gave oral evidence to the Tribunal. He is a Pharmaceutical Toxicologist and the Director of the Drug Control Centre, King's College London (a laboratory accredited by the World Anti-Doping Agency as a testing laboratory) and Director of a private company which specialises in providing expert assistance with respect to a variety of scientific matters especially those related to the analysis of drugs. He assisted the Tribunal in understanding drug use, misuse and potential effects on athletic performance.

38. Dr F was called by the GMC. He provided an expert report, dated 26 April 2018, and gave oral evidence to the Tribunal. He is a Consultant Physician and Endocrinologist at the Royal Victoria Infirmary and Senior Lecturer at the Institute of Genetic Medicine at the University of Newcastle-upon-Tyne. He holds degrees of Batchelor of Surgery and Doctor of Medicine of the University of Cambridge and certificates of Completion of Specialist Training in Diabetes & Endocrinology and General (Internal) Medicine. He is a fellow of the Royal College of Physicians of Edinburgh, a member of the (British) Society for Endocrinology, the European Society of Endocrinology and the (North American) Endocrine Society. He sits on the UK Specialty Advisory Committees for Diabetes & Endocrinology and for Metabolic Medicine and is the UK representative and Treasurer of the Section & Board of Endocrinology of the Union Européenne des Médicins Spécialistes. He sits on the joint exam board overseeing the European Board Examination in Endocrinology, Diabetes & Metabolism. He assisted the Tribunal in understanding Testogel and its potential uses in relation to the treatment of erectile dysfunction.

39. Dr U provided an expert report on behalf of the GMC, dated 28 October 2018. He is a Consultant in Orthopaedic & Sports Medicine and has worked in the field of Sports Medicine since becoming team doctor to Essex County Cricket Club in 1982. He cared for the London Division of Rugby from 1989 to 2000 as team doctor, was part of the HQ medical care for Great Britain Olympic team in the US in 1996 and helped at preparation camps in the US in 1994 and 1995. He was Chief Medical Officer to GB Paralympic team in the year leading up to and during the 2000 Paralympic Games. He teaches regularly at all levels including registrars in training in Sports Medicine, as well as GP's. His written report explored his expertise in the areas of management and storage of medical records, management of medicines, the prescribing of medicines, adherence to medicine management policies, and the treatment of non-athlete members of staff.

40. Dr V also provided an expert report, dated 27 November 2018. He is a qualified General Practitioner, has worked as an Associate GP and as a volunteer doctor, locum GP and out-of-hours GP in traditional General Practice, including dispensing practices. He has also worked in the field of Digital Medicine in a pharmacy company for over three years. He assisted the Tribunal in understanding Prescription Only Medicines.

Independent Psychiatric Reports

41. Prior to the commencement of the hearing in 2019, Dr W was instructed on behalf of Dr Freeman to prepare an independent confidential psychiatric report. His first report was dated 24 September 2019. Dr W is an Honorary Associate Professor of Psychiatry at the University of Leeds and Consultant Liaison Psychiatrist at St James University Hospital in Leeds. From 2009-2015 he was the Clinical Senior Lecturer at the Institute of Psychiatry, Kings College London and Honorary Consultant Liaison Psychiatrist at Kings College Hospital and the NHS Practitioner

Health Programme. He has been a psychiatrist for twenty-one years and a member of the Royal College of Psychiatrists for eighteen years. Prior to the hearing adjourning in December 2019, Dr W provided a further report to the Tribunal, dated 14 December 2019. Dr W produced further reports dated, 8 September & 13 November 2020. Dr W was also called to give oral evidence at the hearing in 2020.

42. On behalf of the GMC, Professor X was instructed to prepare a psychiatric report in respect of Dr Freeman. His first report is dated 20 September 2020. A further report dated 25 October 2020 was also provided to the Tribunal. Professor X is an Emeritus Professor of Forensic Psychiatry at Newcastle University and Honorary Consultant Forensic Psychiatrist in the Cumbrian, Northumberland, Tyne and Wear NHS Foundation Trust. Professor X is a Fellow of the Royal College of Psychiatrists and has researched and published widely in relation to a number of areas in forensic psychiatry. Following the oral evidence of Dr W, Professor X was also called to give oral evidence at the hearing.

43. The Tribunal was also provided with the joint reports prepared by Dr W and Professor X, dated 28 September & 11 November 2020.

Documentary Evidence

44. The Tribunal had regard to the documentary evidence provided by the parties. This evidence included, but was not limited to:

- Documents relating to Fit4Sport's returns policy and the May 2011 order of Testogel;
- 'Sticky' folder email – from Ms C to Dr Freeman dated 18 October 2011
- Product summary: Testogel
- Chronology of events re Testogel
- Medical records relating to Mr D;
- Extracts of texts between Mr D and Dr Freeman;
- Documents relating to UKAD investigation and interviews;
- Documents relating to British Cycling interviews;
- World Anti-Doping Agency (WADA) code: the 2011 prohibited list (international standard);
- British Cycling draft medicine management policy (Version 1 & 2), dated January 2017;
- Loss of laptop report form, dated 9 September 2014;
- Various correspondence between the GMC, Dr Freeman's legal representatives and British Cycling's legal representatives with regard to laptops 1, 2 & 3;
- Extracts from Dr Freeman's book; and
- Redacted transcript with BBC (Mr E), dated July 2018.

45. The Tribunal was also provided with the Transcripts from the 2019, 2020 and 2021 hearing dates.

The Tribunal's Approach

46. In reaching its decision regarding facts, the Tribunal has borne in mind that the burden of proof rests solely on the GMC. Dr Freeman does not need to prove anything. The standard of proof is that applicable to civil proceedings, namely the balance of probabilities.

47. In reaching its determination, the Tribunal took into account all the written and oral submissions from the parties.

48. The Tribunal also took into account the advice provided by the Legally Qualified Chair – which was provided in public session and upon which the parties were invited to comment. The Tribunal accepted fully that advice.

The Tribunal's Analysis of the Evidence and Findings

49. The Tribunal has considered each outstanding paragraph and sub-paragraphs of the Allegation separately and has evaluated the evidence in order to make its findings on the facts.

Paragraph 10

50. The Tribunal found both 10a and 10b of this paragraph proved in respect of 9a.

51. Although, in his interview with UKAD on 17 February 2017, Dr Freeman did not identify the particular person in respect of whom the Testogel had been ordered; he went on formally to confirm, via his legal representative, that the person was Mr D. In correspondence to the GMC dated 8 December 2017, this confirmation was unequivocal:

> *'I now have instructions to identify that the name of the relevant patient is Mr D* […]'

52. That correspondence forms an unchallenged part of the GMC case. Since then, Dr Freeman has never departed from his stated position. More, he has given evidence on oath to this hearing that he obtained the Testogel specifically for Mr D and no-one else.

53. Against that background, the Tribunal was not persuaded by Ms O'Rourke's closing facts submission that, because of the way the Allegation had been framed, strict construction required the GMC to prove not merely that the Testogel was not

ordered for Mr D, but also that it was not ordered for any other non-athlete member of staff, too.

54. The Tribunal considered next the evidence itself.

Preamble

55. A number of significant facts in relation to the order of this banned substance have already been admitted and found proved, as indicated above. Those are established facts in the GMC case and, where relevant, can properly bear upon the Tribunal's consideration in relation to paragraph 10 of the Allegation.

Mr D

56. He sets out his position generally in statements dated 19 April and 13 July 2018. These included a clear denial that the Testogel was for him.

57. In relation to the medical treatment he received from Dr Freeman, he stated:

> *'During my time at British Cycling, Dr Freeman treated me on a number of occasions, as he did with several other members of staff at both British Cycling and Team Sky. For the main part, Dr Freeman treated XXX and did so with XXX. Dr Freeman used to get these out of what looked like a suitcase he would carry around with him. The only other medication he prescribed to me at any time was XXX.'*

58. Regarding the medical records returned to him from Dr Freeman via British Cycling, he stated '*to the best of my recollection* [these] *are an accurate representation of the medical treatment I received at various hospitals during my employment at British Cycling'*. Of the prescriptions, completed for him by Dr Freeman in 2014-15, he stated, '*the amount of medication* […] *seems to be more than I was actually given. I don't recall ever being prescribed that amount of XXX or XXX. Also, the prescriptions appear to be incomplete, as I cannot see any of the XXX prescribed for XXX'*.

59. In relation to Testogel:

> '*The first time I ever heard of Testogel was during a recorded interview with UK Anti-Doping ('UKAD') on 20 October 2016. This interview mostly dealt with allegations separate from the GMC's case but I was asked towards the end of the interview about Testogel and I confirmed I had never heard of it.*
>
> *The only time after this I have heard about Testogel was when it was revealed in the press that some had been delivered to British Cycling in 2011. I knew nothing about this at the time and it came as a big shock to me. I*

couldn't believe that I was not informed of this given that I was in such a senior position with British Cycling at the time.'

60. In his second statement (13 July 2018), Mr D added:

'On 12 July 2018 I was informed by the GMC that Dr Freeman, via his legal representatives, has identified me as the intended recipient of the Testogel which Dr Freeman ordered for delivery to the Manchester Velodrome in May 2011. This is totally untrue. I have no idea why Dr Freeman would suggest this substance was intended for me. As stated in my Initial Statement at Paragraph 8, the first time I had ever heard of the delivery of Testogel to the velodrome was when I was asked about it in an interview with UKAD in October 2016.

As I set out in my Initial Statement […] I had no idea what Testogel was until it was mentioned in the media. Since this time however, I have learned that Testogel is a testosterone supplement used to treat someone who lacks testosterone. I can confirm that at no point during the time I received treatment from Dr Freeman did he mention to me that I had a testosterone deficiency and he and I never discussed Testogel or testosterone supplements or anything similar to this kind of treatment. In addition, given that I now know what it is, I can see no reason why I would require it in light of my medical history…'

61. The Tribunal considered that there was nothing in the background documentation between GMC and Mr D (telephone notes, emails and attendance notes) to introduce any doubt into his unambiguous position on this point.

62. When cross examined during the hearing, Mr D was vociferous in maintaining his position regarding the Testogel. He asserted more than twelve times, over a period in excess of an hour, that it was not for him. For example:

`I can look you in the eye and swear on XXX, I have never ordered any Testogel from Richard, and if Richard wants to take the screen down and look me in the eye and tell me I did then come on.'

And later:

'I would have no problem coming here telling you, Miss O'Rourke, "Yes, it was for me". I am a non-athlete. It is neither here nor there. It is not like any big secret, but as far as I am concerned, if I had ordered it, I have got no problem telling you I ordered it, and you are saying I can't get a hard-on in the Press. My wife wants to come here and testify that you a bloody liar. As far as I am concerned, I have no problem coming and telling the GMC if it

> *was for me. I have no problem at all. It wasn't for me and I never ordered it. It is as simple as that.*'

He denied knowledge of the product Testogel and denied knowledge generally of testosterone gels and patches during *'that period'*.

Mr D and erectile dysfunction

63. The Tribunal observed that there were no medical records or other evidence to indicate that by April and May 2011 Mr D had a testosterone deficiency, nor that had he ever sought or received Testogel. Neither was there evidence that Mr D had, by then, sought or received Viagra or Cialis (being the drugs for which, Dr Freeman contended, Testogel had been a replacement), whether for 'recreational sex' purposes or due to erectile dysfunction.

64. Indeed, there is no evidence - apart from Dr Freeman's assertion - that, by 2011, Mr D had ever been treated for erectile dysfunction at all.

65. Expert witness, Dr F is an Endocrinologist. Having answered questions in oral evidence relating to his experience and competency, the Tribunal was satisfied he was properly able to provide informed evidence to the Tribunal.

66. His evidence was that having read Mr D's April 2018 statement, together with his available medical history (XXX), these disclosed no clinical justification for the ordering of Testogel in April/May 2011. He indicated that, while Mr D's medical records lacked any primary information/GP records, they were sufficiently full for him to make that assessment. He indicated that there would usually be *'echoes'* of medical conditions in records and things tended to be copied from one letter to another.

67. Addressing the proposition that, while Testogel may not have been clinically indicated, it might have helped facilitate Mr D's recreational sex life; Dr F did not accept that Testogel would serve such a purpose, except in a man with hypogonadism. There was no evidence that Mr D had hypogonadism.

68. Dr F said hypogonadism is a failure of the testes to secrete testosterone into the blood circulation. He informed the Tribunal that Testogel is a licensed and on-label use drug in the UK for the treatment of hypogonadism.

69. Dr F accepted that Testogel could have been used as a placebo, but only in the sense that '*any drug can have a placebo effect*'.

70. The Tribunal considered that Dr F gave clear, compelling evidence in all these respects. It returns to this topic later.

Mr D's credibility and probity

71. Dr Freeman's position was that, while Mr D might have denied the Testogel was for him, his history (which, Dr Freeman asserted, was one of bullying, lying and doping) meant Mr D's probity could not be relied upon.

72. This position was put to Mr D in cross-examination during his oral evidence, up until the point he left the hearing.

73. The Tribunal does not rehearse here Mr D's oral evidence, the matters put to him, and the circumstances of his early departure from the hearing. The Tribunal's view of the salient features is set out in Annex G, including its assessment of those events.

74. Before his departure, no documentary materials were produced to Mr D to support these assertions against him, although it was indicated that Dr Freeman already held supporting material (Ms O'Rourke: '*I have got evidence. I have got statements*'). Mr D was informed that there were statements from '*about five*' witnesses. There also appeared to exist an incriminating text to evidence Mr D's allegedly threatening and bullying way towards Dr Freeman. Thus, at one point during cross-examination, after Mr D described Dr Freeman as having been a friend, the following exchange took place:

> *'Q: Ms O'Rourke: A friend wouldn't send to a friend a text that says, "Be careful what you say. Don't drag me in. You won't be the only person I can hurt." That is the text you sent Dr Freeman at the back end of last year.'*
>
> *A: Huh. Show me all your texts.*
>
> *Q: We are going to come to texts in a minute […]*
>
> *A: Show me all your texts*'

75. That text was not produced in evidence to the Tribunal. A number of other texts, to and from Mr D, were produced on Dr Freeman's behalf (as transcribed from his phone by his legal team). Strikingly, Mr D's tone in each of them was friendly and solicitous:

> *'22.06*
> *txt*
>
> *- can you talk now-*
> *Here if you need me […]*

Mr D -??
- great, call me, we
Can meet in Starbucks
Hope you are OK…

Mr D - 'Doc not well
but meeting him
Need to get my arm
round him?'

Mr D - "I sent the above to
Z. We need to support
You mate. I know
what your going through.
+ you need people
around you don't just
take it all yourself
Sorry got day wrong
Thursday is fine.

76. Two witnesses were called on Dr Freeman's behalf with evidence bearing upon Mr D's character.

77. The first was Mr Q, the father of the former professional cyclist, Ms R.

78. In adopting his written testimony, he presented as a fair and balanced witness, detailing his engagement with Mr D in the context of wider concerns that he (Mr Q) had regarding British Cycling.

79. However, in every respect that related to issues this Tribunal was considering, Mr Q's evidence was hearsay. Potentially pertinent examples were continually prefaced with phrases like '*I was advised that* […], *I was given the following first-hand account* […]*, it was common gossip that* […], *one long-term acquaintance of mine provided this anecdote …while preferring me not to state his name* […]', and so forth.

80. The GMC did not agree Mr Q's evidence. Insofar as other witnesses might have been able to speak directly to the matters that were the subject of the hearsay, they were not called to give evidence. In the circumstances, the Tribunal determined that it could not fairly or safely attach weight to these aspects of Mr Q's evidence.

81. On the issue of Mr D and drug taking, Mr Q confirmed the information he had shared with UKAD. Namely, that:

> *'[…] Possibly, we were over-cautious, and Mr D is innocent of any connections with performance-enhancing drug abuse. Certainly, neither Ms R or myself have seen him use performance-enhancing drugs, nor has he ever suggested to Ms R that she should. So, on prime evidence he is certainly innocent, and Ms R and I have been unnecessarily cautious.'*

82. The second witness was Mr S. His statement was confined to recounting, briefly, the prevalence of drug use in professional cycling circa 1987, when he had been a team-mate of Mr D's.

83. While his statement referred obliquely to *'treatment'* being provided for Mr D at some stage, that word was not unpacked by either advocate.

84. Mr S did not allege that Mr D had used drugs, whether Testogel, testosterone generally, or any other kind. He could only say that it was likely Mr D would have been aware of drug use during the period.

85. He gave an example in support of this claim. While diminished under cross examination, the example was in any event essentially irrelevant as Mr D had never denied knowledge of drugs in cycling, as in sport more generally. What he denied was having any specific knowledge of Testogel before 2016 and, more generally, of ever having abused drugs himself.

86. No witness evidence was adduced to gainsay Mr D's claims in these regards.

87. Moreover, the Tribunal noted (in relation to Mr D's denial of drug abuse) that this was consistent with Dr Freeman's own impression of Mr D in 2011. In oral evidence, Dr Freeman described him as a *'straight shooter'*. And, in his third statement (undated) for the hearing, Dr Freeman had said:

> *'I believed that Mr D adhered to the letter of the WADA code and had never suggested nor demanded that I break it for any rider at British Cycling. He may have been abrasive and demanding but I never once considered him a doper. Indeed, the Senior Management Team […], Sir Z, Dr A and Mr D, instructed me at my induction at British Cycling in 2010 that if any rider or coach should ever indicate that they wished to be prescribed something which was not permitted under the WADA code, that I was to immediately notify [them] and at the same time refuse the request. They stated that my position would be protected no matter how senior and successful that rider was'.*

88. Dr Freeman went on to say, in re-examination, that while that had been his opinion of Mr D at that time, his view had since changed. He did not elaborate upon this. Nevertheless, the Tribunal noted that a number of allegations relating to Mr D were contained in documentary material submitted by Dr Freeman. This material was considered carefully by the Tribunal. It comprised a selection of telephone

notes, emails, extracts from reports and journalistic 'source notes', as well as a statement from Mr AB (an ex-team mate of Mr D in 1988) which had been prepared for a Department for Digital, Culture, Media and Sport ('DCMS') Select Committee. Mr AB's DCMS statement made a serious allegation against Mr D. However, Mr AB did not make a statement for the purpose of this hearing, and neither did he attend to speak on the issues raised in his DCMS statement. Excepting Mr Q, no one else named in the documents provided statements or gave evidence for the hearing. The documentary material itself was not agreed by the GMC.

89. Therefore, bearing in mind the form of these documents, coupled with the absence of witnesses or witness statements to speak to their contents, the Tribunal determined that no weight could properly and safely attach to the material in such circumstances.

90. Elsewhere, it was submitted (in terms) that the Tribunal had reason to question Mr D's probity and credibility on the basis that:

> i. he had lied about not having read Dr Freeman's book;
>
> ii. he had claimed to have limited knowledge of the so-called doping abuse scandals involving Lance Armstrong and Floyd Landis and the use of testosterone patches and Testogel; and
>
> iii. XXX.

91. However, the alleged 'lie' at (1) was based upon the contents of a telephone note of a conversation between the GMC and Mr D. The submission presupposes the note to have accurately captured how Mr D had expressed himself. Mr D disputed this. The Tribunal observed that it was not a transcript, nor had it ever been endorsed by Mr D as accurate (he said he had never seen it before the hearing). The Tribunal considered the assertion that Mr D had committed a 'double lie' by (i) denying having read the book, then (ii) referencing topics the book had not included. However, the Tribunal thought much more probable the likelihood that any such referencing errors only confirmed he had not read Dr Freeman's book, but instead had acquired an inaccurate second-hand account of its contents by other means. The Tribunal reminded itself of Ms O'Rourke's later observation in another context:

> *'don't over-analyse a letter by a Solicitor – he was not getting the words for a court use – it was an attendance note.'*

92. In relation to (2): simply, no persuasive evidence was placed before the Tribunal to contradict Mr D's claim - any more than to contradict Dr Freeman's subsequent claim - about his level of awareness regarding these particular doping

stories (namely that, while he was aware of the stories, he had not specifically read about them nor followed their detail.)

93. Ms O'Rourke did not, in relation to (3), have the opportunity to cross-examine Mr D about XXX.

94. XXX.

95. XXX.

96. Ms O'Rourke also submitted on Dr Freeman's behalf that an '*all but inevitable*' inference should be drawn from journalist Mr CD's refusal to answer a subpoena and give evidence, and the 'MailOnline's' refusal to comply with a request under R35A Medical Act 1983, that Mr D was both Mr CD's informant and the intended recipient of the Testogel. (This submission related to a 'MailOnline' article, published in October 2016 by Mr CD, a sports journalist, concerning Team Sky/British Cycling and an 'anti-doping drugs probe'. The article made no mention of Testogel or any derivative of testosterone.) On the information provided to the Tribunal, though, it was unpersuaded of the logical necessity to arrive at that inference on the basis of those refusals.

97. More generally, it had been submitted by Ms O'Rourke that Mr D's early departure during cross-examination was occasioned by his unwillingness to be caught out in a lie (on the basis that he had known '*what was coming next*'). However, having considered carefully the written list of topics Dr Freeman had wished to put to Mr D, having heard representations by Ms O'Rourke on their significance, and having seen the evidence and materials eventually relied upon by Dr Freeman to support those topics, the Tribunal considered it unlikely that an *'unwillingness to be caught out in a lie'* was the reason for his early departure.

98. While it was most unwelcome, the Tribunal considered (having now received all the evidence) that the reason for Mr D's departure remained as set out in Annex G.

99. To be clear, Mr D's behaviour during the hearing was intemperate. Nevertheless, the Tribunal had no basis to determine his evidence untruthful on its face, nor when set against the other matters above. In coming to this view, the Tribunal reminded itself of the advice provided by the Legally Qualified Chair and bore those considerations carefully in mind.

100. Taking all those matters together, the Tribunal found there was no properly formed evidential basis to call into question Mr D's account, nor to challenge his probity. Put shortly, the Tribunal found Mr D to be a credible and consistent witness.

101. The Tribunal went on to consider Dr Freeman's evidence, as it pertains to paragraph 10.

Dr Freeman's account - overview

102. Dr Freeman indicated that his statement of 24 September 2019 represents his truthful position. As he confirmed during Tribunal questions, it was not until this statement *'that I was finally able and prepared to tell the truth to the GMC and yourselves'.*

103. The statement ('his main statement') was prefaced with the following:

> *'It has taken a long time for me to produce this witness statement and it has undergone many re-writes and variations – particularly at the start of the year and prior to the scheduled February start date. For the reasons I set out below I was too scared to tell the truth as to the circumstances surrounding the ordering of the Testogel and in order to protect myself I lied about the events to UKAD, to my solicitor and legal team and even to psychiatrists examining me. I could not bring myself to admit what actually happened for fear of retribution by the individual [who he goes on to name as Mr D] who threatened me (and was continuing to threaten me in January/ February just before the hearing and when I was struggling with what to tell my lawyers and what to sign off in my witness statement).*
>
> *Such was my distress and on the one hand the tension between knowing that the time had come to finally tell the truth and on the other hand the fear of violence from the person threatening me that I became very unwell […]*
>
> *I have now had time to recover and reflect and despite ongoing concerns as to the threats to me – albeit belatedly – [I] acknowledge in this statement that I have not been truthful until now as to the circumstances surrounding the Testogel and what followed.*
>
> *I ask the Tribunal to take into account my fear and turmoil – and my underlying health issues in judging my conduct both in respect of placing the order for Testogel and then panicking and attempting to cover it up when the matter came to light.' […]*

104. In addition to that statement, Dr Freeman made two further ones for this hearing, each responding to evidential developments in the GMC case. Together, these three statements were adopted as Dr Freeman's evidence-in-chief. Dr Freeman also answered questions in cross-examination from Mr Jackson over a period of weeks, doing so calmly, patiently and politely. He answered questions from the Tribunal in a similar manner. Coupled with the aforesaid, the Tribunal had Dr Freeman's historical accounts to UKAD, and to a Parliamentary Select Committee

('*Combatting Doping in Sport*') Inquiry, as well as the account he gave to an examining psychiatrist, Dr W, on 13 August 2019.

105. Dr Freeman's evidence was this.

106. He asserted that in 2011 Mr D was a powerful and intimidating force at British Cycling, and that he was somewhat cowed by him. Mr D could be both threatening and violent. Potentially, he had it within his gift to remove Dr Freeman from his job, if he chose to. In the circumstances, Dr Freeman indicated that the doctor/patient relationship between them had lost its balance.

107. Set against that background, in April 2011 Mr D had demanded Testogel to aid his sex life in circumstances where he was already suffering from erectile dysfunction. Dr Freeman said he had previously treated Mr D with Viagra and Cialis, but Mr D told him those drugs were no longer working. In his main statement, he puts matters in this way:

> *'In April 2011 […] Mr D approached me […] and told me that [the Cialis tablets] were not working. He specifically requested that I prescribe him Testogel. I replied that I could not get that for him and said that he should speak to his NHS GP. […] The exchange was relatively brief, over a couple of minutes, and I had difficulty in getting a word in […] Shortly after, I looked Testogel up, in BNF, as I was not familiar with it and had never prescribed it before. I think I may have undertaken an internet search concerning it and by these enquiries I confirmed that it was testosterone treatment by patches, and I confirmed the doses available. I was of course aware that testosterone was a banned drug in terms of sport, but did not at that point have any thought that Mr D had requested this for anyone other than himself or that it could be used for doping purposes given its visible topical application'.*

108. Although he had initially refused to supply the Testogel to Mr D; he says that approximately a month later, impulsively, without further request or prompt from Mr D, he ordered the drug from Fit4Sport. When it arrived at the Velodrome, the package was in opened by Mr B. Knowing it was a WADA-prohibited substance, Mr B confronted Dr Freeman in the presence of Dr A. Dr Freeman says he panicked and claimed the drug had been sent in error. He said he would return it.

109. In that main statement, Dr Freeman indicated that the reason he did not disclose immediately that the drug had been ordered for a patient was because XXX. Mr D had expressly told him he did not want Dr A XXX to know XXX.

110. For this reason, Dr Freeman lied and said the delivery was a mistake.

111. From May 2011 until 2017, his other admitted lies and dishonest behaviour, as captured in the GMC's wider Allegation, were in effect the concomitant of trying

to contain the consequences of that first lie and/ or seeking to avoid disclosing Mr D's identity.

112. XXX.

113. More generally, Dr Freeman's account also detailed the subsequent deterioration in his relationship with Mr D (from '*about 2015*') and the reasons for this. He indicated that his fearfulness in relation to Mr D - engendered by the latter's threatening behaviour towards him, up to and including this hearing itself – directly influenced his conduct, as well as affecting his health, across the entire period.

Analysis of Dr Freeman's evidence

114. When reflecting upon Dr Freeman's evidence, both on its own terms (in all its iterations) and in the context of the other evidence, the Tribunal reminded itself that, prior to these matters, Dr Freeman was otherwise of good character. He was a doctor with a long and distinguished medical career. While it noted, therefore, that he had already admitted a number of dishonesty matters relating to the ordering of the Testogel; these might be regarded – on his account – as the consequence of Mr D's firm injunction to *'keep him out of it'*, an injunction he lacked the strength to resist. Put another way, the Tribunal kept in mind the possibility that any taint to his credibility arose out of one narrow issue, occasioned under duress, and that therefore he could otherwise be assumed to be a witness who told the truth.

115. Additionally, the Tribunal bore in mind the impact his health condition (Bipolar Affective Disorder Type II) might have had upon his actions, taking into account expert evidence which addressed those issues.

116. It took into account the passage of time and the impact this can have when a witness is asked to give accounts over a nine-year period.

117. Finally, it considered, too, Mr D's character, as described by witnesses such as Mr B and Dr A, and as witnessed by the Tribunal in live evidence; and the extent to which this was relevant.

118. However, while bearing all those matters very carefully in mind throughout its deliberations, the Tribunal determined that Dr Freeman's evidence was implausible. It did not believe he ordered the Testogel for Mr D.

119. To recap, at its essence, Dr Freeman's claim in his main statement had been that:

a. The Testogel was for Mr D. He demanded it in April 2011 for his erectile dysfunction; something Dr Freeman identified as a

'*psychological issue*', and for which he had been treating Mr D since 2010.

b. While he did not want to order it for him, Dr Freeman did so impulsively approximately a month later. This was in circumstances where he already felt generally low ('*a chronic depressive state*') and where, at the particular time, he had felt anxious and bullied by Mr D's presence. He claims that Mr D '*swore at me saying […] I better get him some* [Testogel] *if I wanted to keep my job'* Of Mr D: '*I was very scared. I knew he was a violent man*.'

c. Once confronted by Mr B and Dr A about the arrival of the drug, he was unable to identify Mr D as the intended recipient for the reason set out above and '*for fear of retribution given their reaction*'

120. The Tribunal rejected Dr Freeman's evidence for the following reasons.

Rationale for ordering Testogel

121. Firstly, as a highly experienced doctor, the reason Dr Freeman claims to have ordered Testogel (i.e., to treat Mr D) was unconvincing in itself.

122. Mr D, a credible witness, says the Testogel was not for him.

123. There are no medical notes to suggest that, in 2011, he had any need of Testogel, or testosterone generally.

124. Expert witness Dr F indicated that it was not clinically indicated for Mr D. Dr F was clear that investigations would have been necessary to find a low testosterone and/or hypogonadism.

125. For his part, Dr Freeman himself accepted the Testogel would not have been clinically indicated for Mr D:

> *'[…] it was bad medicine. It was me being leaned on, being forced to do something I didn't think was clinically appropriate without expert analysis or me analysing it.'*

In this regard, Dr Freeman confirmed that he did not perform any investigations, examine Mr D, or refer him to a specialist, when considering getting him the Testogel.

126. While Dr F said that Testogel could have been given as a placebo, Dr Freeman is clear that it was not its intended purpose:

> *Q: 'Can we be clear that in relation to Mr D the position remains the same, that you prescribed for him because he asked you, told you, bullied you – whatever your phrase is. It was not that you were prescribing it as a placebo.*
>
> *A: Prescribing what, please?*
>
> *Q: The Testogel.*
>
> *A: No, it wasn't a placebo.'*

127. Dr Freeman's evidence was that Mr D presented with erectile dysfunction which he concluded was a psychological issue due to multiple concurrent sexual partners. Dr Freeman claimed that Mr D had indicated the Cialis tablets were no longer working for him in this regard and sought Testogel in its place. However, the Tribunal accepted Dr F's evidence that Testogel would not benefit a patient for a short-term recreational boost in sexual function, of the kind that Cialis can achieve in patients.

128. Finally, in his oral evidence, Dr Freeman explained that he had heard of other doctors in the UK and the USA prescribing testosterone off-label for men who may have a lack of testosterone (androgen or relative androgen deficiency) due to aging.

129. Dr F had identified recognised and evidenced based off-label uses of testosterone. Aging was not included among those examples he provided. Nevertheless, Dr F stated he was aware of the off-label use to which Dr Freeman had referred. Despite this, Dr F's conclusion remained that the Testogel was not clinically indicated for Mr D for the reasons articulated above.

130. Reflecting upon this, the Tribunal observed the absence of notes by Dr Freeman relating to its prescribing. The Tribunal was aware, of course, that poor record-keeping by Dr Freeman had been admitted by him elsewhere in the Allegation. However, it stretched credulity that a high-profile, experienced sports doctor would order a potential banned substance under the WADA code; yet, despite the significance of this, fail to make a record of the intended patient, the circumstances, and the proposed off-label use. Even if the order had been an impulsive act (as he claims), there would have been an opportunity between order and delivery to capture the circumstances in writing.

131. In addition, the Tribunal struggled to understand why, if he were trying to impress Mr D with a '*clever diagnosis'*, he had settled specifically upon Testogel as the form of testosterone to administer:

> *Q:*' […] *did you have in mind to supply testosterone to him in one particular form or by one particular method, rather than another?*
>
> *A: Yes.*

Q: Had you reached some initial view about what you might do?

A Yes.

Q: And what was that?

A: By gel applied to the skin on a daily basis.

Q: Oh, you always intended to give him gel by the skin, did you?

A: Yes.'

132. An injection of testosterone would have yielded the same benefit and for a much longer period (12 weeks, for example, in the case of the injectable preparation known as Nebido, according to Professor T, rather than Testogel's once daily application.)

133. Moreover, the fact that an injection of testosterone did not have the shorter *'detection time'* of a gel or a patch would have been a contrary indication to the use the GMC now alleges. In this regard, the Tribunal notes that, in commenting upon the CIRC report and its indication that '*in order to avoid detection, riders have for some time been using testosterone patches and gels because they release smaller quantities and the detection time is therefore shorter'*, Professor T puts it thus:

> *'It is correct that proving the administration, being very similar to that produced endogenously, is more difficult than for other anabolic steroids that are formed to the body. Carefully adjusting the dose by using testosterone patches and gels will make detection of this misuse even more difficult'.*

134. Dr Freeman explained only that people tend not to like needles.

> Q:' […] *On what clinical considerations did you make your judgement in respect of that decision? Why that method rather than another?*
>
> *A: Nobody likes to have an injection* […]'

135. There is no evidence to suggest, however, that was the case with Mr D.

<u>Threats and bullying</u>

136. The Tribunal went on to consider whether the medically incoherent nature of his actions, and the lack of supporting paperwork (or indeed engagement and discussion with colleagues), arose out of the particular nature of his relationship with Mr D at that time.

137. Throughout his evidence, Dr Freeman indicated that he was intimidated and frightened by Mr D's violent, threatening/ bullying character, and by his power to influence decisively whether he could retain his job.

138. Generally:

> *'I could not bring myself to admit what actually happened for fear of retribution by'* [Mr D] (Main statement)
>
> *'I have a genuine fear of Mr D and I know from experience that he is a violent man.'* (Third statement)
>
> *'Dr Freeman told me, 'I have seen him punch people'. Dr Freeman told me that Mr D had told him that when he grew up he engaged in […] 'Aboriginal baiting'. Dr Freeman told me that he had seen Mr D punch a driver through an open window during a road range incident'* (His account to Dr W)
>
> *'I had heard the story of him knocking somebody out at a bar in Majorca at a training camp. He told me himself that on a Saturday night he would have a drink where he lived in the outback and go – it is an awful term – Abo bashing; and, yes, my judgement was clouded by a whole variety of things; yes.'* (Dr Freeman's oral testimony)

139. After disclosing to Mr D that Mr B and Dr A had confronted him about the Testogel,

> *'He [Mr D] said 'don't drag me into it or you'll be sorry and I don't mean just losing your job'. He was, as usual, aggressive saying that I would wish I had never been born. He said that 'I was a cunt, not a team player, that I was finished in cycling and better start looking for a new job. My levels of anxiety increased enormously. I was very scared. I knew he was a violent man'.*

140. Dr Freeman suggested these influencing factors provide context to his conduct in April and May 2011 (both in respect of causing him to order the Testogel, and not disclosing the intended recipient to his colleagues). He asserted that Mr D's threatening and bullying behaviour has continued to the hearing itself, adversely effecting his judgement:

> *'[Mr D] threatened me (and was continuing to threaten me in January/ February [2019] just before the hearing and when I was struggling with what to tell my lawyers and what to sign off in my witness statement)'*
>
> *'Such was my distress and on the one hand the tension between knowing that the time had come to finally tell the truth and on the other hand the fear of*

> *violence from the person threatening me that I became very unwell […]'* (Main statement)
>
> *'Dr Freeman told me that Mr D's threatening behaviour has continued until very recently. Around the time of the original proposed tribunal in early 2019, Dr Freeman told me that Mr D contacted him to say, 'be careful what you say, don't drag me, you won't be the only person I can hurt.'* (His account to Dr W)

141. He is also recorded as having said to his psychiatrist, Dr Y, on 1 February 2019, *'Frightened of Mr D. He threatened me a few times, he threatened to assault me and the family in relation to testosterone patches'*.

142. The Tribunal reminded itself of the expert psychiatric evidence from Dr W and Professor X on this theme.

143. Each expert had given evidence upon the potential impact of bullying on Dr Freeman, given his medical condition (Bipolar Affective Disorder Type II). In some respects, their opinions diverged. However, each predicated their opinion upon the Tribunal first finding, as a fact, that bullying had occurred.

144. In assessing whether it had occurred, the Tribunal was assisted by evidence from two witnesses, Mr B and Dr A, who had worked very closely with both Dr Freeman and Mr D. Each was an impressive witness, and gave cogent and compelling evidence on this issue, as more generally. It was clear that both witnesses regarded themselves as a friend and colleague to Dr Freeman. Their affection and concern for him was equally clear.

145. Each witness made essentially the same point. Namely, that Mr D could be a scratchy and irascible character and, when under pressure, he would indeed engage in bullying behaviour.

146. However, up to and including the time in question (April/May 2011), neither one had witnessed Mr D specifically threaten or bully Dr Freeman, nor had Dr Freeman ever disclosed that Mr D had threated or bullied him.

147. Mr B:

> *'I would say that Richard and Mr D's relationship deteriorated significantly. When I first started working with Richard and Mr D – I worked with Mr D way before Richard but when Richard first came to the team him and Mr D had a pretty good relationship, I would say. He had a way of calming him down; he had a way of talking to him that sometimes I struggled to achieve. […] Sometimes at the beginning there, Richard could cajole Mr D and manage him better than I could and bring him round to a considered opinion, or whatever,*

on certain things. But, again, at times though it became very... We had to go to see Dr A. But in 2015 [their relationship deteriorated over a disputed plane fare]'

148. In his written evidence, Dr A stated:

'With regard to Dr Freeman's interactions with Mr D; he did occasionally complain to me that Mr D was unreasonable, but I do not recall Dr Freeman ever approaching me to suggest he was being bullied by him, but rather that Mr D could be intimidating, demanding and unreasonable in his behaviour. When Richard did raise this, he was quite dismissive of Mr D and accepted this was just Mr D.'

149. And, in his oral evidence he added:

'He [Dr Freeman] didn't complain to me about it. What he would do is he would come in and he might say, "Mr D's on the warpath again. He is using his usual shouting at me technique", which is aggression, and then we would sit and discuss this. Generally, it was Mr B, myself and Richard. Our approach, for all three of us, was one of just shrugging of the shoulders and thinking, "Okay, I will go in again and do it". So that was the key. I would say, "Just leave it with me", because I had a good working relationship with him, where I think Richard and Phil found it very hard to stand up to that, as did most of the team.

Q: What do you mean, "They found it very hard to stand up to him"?

A: They didn't know how to handle that aggression, so how to defuse it. That was true of many of the athletes.'

150. As Dr Freeman indicates in his third (undated) statement, he considered Dr A to be not merely his *'direct supervisor/ line manager and […] the head of the British Cycling medical department'*, but also to be a `*colleague and friend'*. Dr A confirmed this:

'Richard and I were friends. He confided an awful lot in me. I was involved in a lot of his both professional and personal life.'

Dr Freeman indicates that, in relation to Mr D's allegedly *'unacceptable'* behaviour towards him, Dr A had expressly said *'he would always have my back'.*

151. Given their close relationship, and given that Mr B and Dr A specifically recount conversations with Dr Freeman regarding Mr D's behaviour; the Tribunal considered it striking that Dr Freeman never once made disclosure of Mr D's bullying

or threats (including the threat of losing his job), particularly in circumstances where Dr A would have been the means by which any problems would have been defused.

152. Likewise, the Tribunal noted that, despite his close relationship with consultant psychiatrist Dr Y (someone from whom Dr Freeman had no reason to keep secrets), there is no record of Dr Freeman having made disclosure of such matters at that time.

153. Indeed - in what Dr W describes as '*extensive*' correspondence between Dr Y and his patient Dr Freeman covering the period 2001 to 2019 - the first mention of Mr D only occurs eight years after the Testogel order took place, in the entry dated 1 February 2019, mentioned above. It is only then, and for the first time, that Dr Freeman is recorded indicating '*there had been a few interpersonal difficulties with Mr D over the years and Richard felt intimidated*.'

154. More generally, no other witnesses gave evidence in relation to this theme.

155. On the balance of the evidence, therefore, the Tribunal was not persuaded that undisclosed incidents of bullying and threats had already taken place, and were taking place, such as to form the context to events in April/ May 2011.

156. Returning to the expert evidence of Dr W and Professor X: as indicated, each predicated an opinion upon the Tribunal first finding, as a fact, that bullying had occurred. The Tribunal did not find this in relation to 2011. Accordingly, the experts' conclusions in this regard were not impactive.

157. For completeness, the Tribunal recognized that in later years (from '*about 2015*' according to Dr Freeman) the relationship between these men became more strained. It seems plain that a financial dispute over an air fare was particularly damaging. Mr B alludes to this above, and Dr Freeman notes it as a 'significant issue' in the deterioration of their relationship:

> *'Mr D demanded I pay the total cost of the flight (several thousands of pounds) and […] I was forced to do this, although I was later given an ex-gratia repayment of £1000 to let the matter go. Mr D mocked me in regard to that issue openly in front of others.'*

158. In a GMC attendance note, Mr D likewise acknowledged it. He suggested that his refusal to authorise reimbursement was something for which he believed Dr Freeman never really forgave him.

159. Further deterioration occurred in September 2016 when Dr Freeman claimed that he received phone calls from Mr D saying that he had *'spoken to a journalist who was going to run a story regarding an illegal injection in the bus at Sestriere in 2011, and that we were all finished'*.

160. And, after Dr A left British Cycling in 2014, Mr D's behaviour is said to have deteriorated generally. It is within that later period Mr B confirmed behaviour he characterizes as bullying by Mr D towards Dr Freeman.

161. Asked whether he had himself ever been bullied, Mr B said '*Working at an elite level in sport can be quite challenging and consequently I had many difficult conversations, some which were not pleasant at all. I experienced what I perceived was one veiled threat but as to bullying, this never happened to me because I am not the sort of person to let it happen*.'

Then:

Q: '*Were you aware as to whether Richard Freeman was subjected to the same sort of behaviour* [from Mr D]?'

A: *Definitely after Dr A left, yes.'*

162. However, the evidence also indicates that, while Mr D's later behaviour might have made him feel intimidated, Dr Freeman's resultant actions could – on his own testimony – be robust. In other words, he does not appear to have been inhibited by Mr D's behaviour. Thus, in his main statement he gives the example of facing down Mr D after he had demanded information, along with Dr Freeman's phone and computer, in relation a 'whistleblowing' incident. On another occasion, he said he refused to sign off a £6000 dentistry invoice for Mr D, instead confronting him about it.

163. On the more specific issue of actual threats to Dr Freeman, including threats of violence, the Tribunal has not been provided with any evidence to corroborate this claim.

164. When specifically asked *'had he ever taken hold of you and pushed you up against the wall or grabbed you by the lapels or tried to hit you?'*, Dr Freeman's reply was '*Certainly not'*. (Oral testimony)

165. While Ms O'Rourke, in cross-examining Mr D had foreshadowed the existence of a text which might provide relevant evidence (per paragraph 74 above); that text, if it exists, has not been produced to the Tribunal.

166. Dr Freeman also mentioned in his main statement that he had received a threatening text shortly before the hearing:

'In January/February [2019] before I was due to attend the MPT, he sent me a text, which was upsetting […] and at the time I found it threatening. I

deleted the text at the time. I was very scared. I later told the psychiatrists about it […]'.

167. When the Tribunal sought clarity on its contents, though, he claimed he deleted it without taking stock of its contents:

Q:'[…] You say that Mr D sent you [a text] in early 2019, in other words shortly before the original MPTS hearing date. You said […] the text that you received you found threatening. Can you, to the best of your recollection indicate what the text said, please?

A: No, I was not in a good place then. I remember I got it in bed when I had obviously been ... At the time I was self-medicating with alcohol. I was really surprised that […] he had access to me, and I am still surprised how he managed to locate me, so I found it […] very intrusive, I found it very upsetting, and […] you try not to read a text when it comes in but you can see a bit of it, and I just swiped to the left and got rid of it, and didn't want to have any more from him or any contact at all. That is my explanation and that is what happened, Mr Dalton.

Q: So basically, what you are saying then, as I understand it: it is not that when you read the contents of it, those contents were threatening, but rather the simple fact of having received a text from him of itself you found threatening?

A: Yes, that he had got into my bedroom […] had got into my private life, yes.

Q: Yes, I understand. You deleted it immediately without even fully reading it, is that correct?

A: Yes. Yes.'

168. Therefore, as previously mentioned, the only texts from Mr D that Dr Freeman has placed before the Tribunal have been friendly and solicitous.

169. On the basis of all the above, just as the Tribunal did not find a context of threats and bullying in 2011 that might otherwise explain Dr Freeman's medically incoherent action in ordering the Testogel; neither did it find on balance that, insofar as their relationship deteriorated in later years, it resulted in Dr Freeman feeling cowed, and his actions inhibited, in the way he now seeks to suggest.

<u>How the original exchange about Testogel is said to have occurred, and the issue about patches v gels</u>

170. The Tribunal then returned to, and considered carefully, Dr Freeman's account of how the alleged conversation with Mr D occurred, along with the reason why he claims to have thought that, despite Testogel being a prohibited substance, it would not be put to an improper use.

171. When considering his 1st and 3rd statements, in tandem with his account to Dr W, the Tribunal found elements of Dr Freeman's evidence confusing. There was a lack of clarity regarding:

- Whether there had been one discussion between them or more than one; and
- Which of them had specifically introduced the idea of Testogel. In other words, had Dr Freeman initiated it as a 'clever diagnosis', or had he merely mentioned testosterone – to which, in response, Mr D had demanded Testogel (requiring Dr Freeman, his knowledge of that substance incomplete, to go away and look it up).

172. On the basis of Dr Freeman's oral evidence, the Tribunal was nevertheless prepared to take his credibility at its highest and assume these ambiguities could be attributed to the passage of time and the different ways in which the matter had been variously recorded.

173. More serious and unambiguous was his shifting stance regarding whether he had thought he had been ordering patches as opposed to gels. The Tribunal's view of this, like to XXX below, went directly to its perception of Dr Freeman's credibility as a witness of truth in relation to Allegation 10.

174. The background is that Testogel is a testosterone gel. Patches, like gels, could and had been used for doping by cyclists. The Tribunal noted that Testogel is a transparent colourless gel which, unlike a patch, would be invisible. Professor T indicated *'the use of Testogel or testosterone administered in gel form is extremely easy and requires no medical knowledge or training. It is simply applied to the skin in a thin layer and allowed to dry for a few minutes'*.

175. From his early UKAD interviews, Dr Freeman had always chosen to describe Testogel as a patch (*'I placed an order for testosterone patches'*). This remained his chosen descriptor up to the hearing. It can be found throughout the case papers.

176. Towards the end of his oral evidence, however, Dr Freeman confirmed not merely that he knew Testogel was a gel, but that he had always known it:

> *'Q: […] you have said today that you have always known it was a gel, you ordered a gel, you looked on BNF and it was a gel, and that is what you got, a gel?*
>
> *A: Yes.'*

177. He asserted that insofar as the word 'patch' had slipped into his previous accounts, it had been inadvertent. He suggested it had occurred either because Mr B had used the expression -

> *'Q: Why did you say that?*
>
> *A: Mr B came into the room, he had opened them and he said they were patches, and that is where that trail has come from'.*

or else it was due to a drafting error by his lawyer:

> *'Mr Eastwood has certainly got it into his head these were patches, and numerous times he has assisted me with the preparation of all my documents and I believe that is how it started to get into, but I have got no other explanation.'*

178. The Tribunal considered this implausible in itself. More, it was at odds with his earlier evidence to the Tribunal. Therein he had specifically claimed that, while he now knew it was a gel, '…*at the time I believed it was patches'*

179. The Tribunal did not believe his use of *'patches'* was an accident; particularly given the way he had so strikingly framed his account in his main statement. Therein, he expressly sets out the approach he claims he undertook precisely to reach the determination that Testogel was a patch. And, having reached it, he asserts that the very fact it was a patch, and thereby had a *'visible'* topical application, was why he had no reason to consider it might be used for doping:

> *'I looked Testogel up, in BNF, as I was not familiar with it and had never prescribed it before. I think I may have undertaken an internet search concerning it and by these enquiries I confirmed that it was testosterone treatment by patches, and I confirmed the doses available. I was of course aware that testosterone was a banned drug in terms of sport, but did not at that point have any thought that Mr D had requested this for anyone other than himself or that it could be used for doping purposes given its visible topical application'.*

Pursuing his reasoning, it follows that - in ordering a gel - he would readily have known it could be used for doping purposes.

180. The Tribunal considered his account in this regard was wholly untenable. It was clear that Dr Freeman had been deliberately seeking to distance himself from an understanding that what he had ordered was a gel. (Even when describing the Mr B confrontation, he expressly chooses to describe his friend holding a sachet that contained a '*plaster*'.)

181. He was being dishonest in this area of his evidence and seeking to mislead the Tribunal.

Dr Freeman's reason for lying when confronted with the Testogel

182. Finally, the Tribunal approached Dr Freeman's evidence from another direction. It considered why, if he had ordered the Testogel for a patient (Mr D), he had not simply stated this to Dr A when the delivery arrived.

183. In his main statement, Dr Freeman's reasoning was precise:

> '*Mr D was incensed that* […] *Dr A* [had] *XXX. As a medical team, we discussed rider and staff medical issues, again in strict medical confidence, and Mr D was aware of this. He was absolutely insistent, verbally explicit that I should never discuss his sexual problems with Dr A ever. Mr D threatened if I did he would get me sacked, and explained that I only survived at BC because he was covering my back. These two themes became a recurrent theme in our interactions in the ensuing years, that I was one step from being sacked, and that I would only remain as he had got my back. It was against this background that the events of 2011 unfolded*.'

184. Three weeks earlier, Dr Freeman had made the same claim to an independent psychiatrist, Dr W:

> '*Dr Freeman told me that Mr D had intimidated him by saying, 'Lots of doctors want your job'. Dr Freeman also told me that Mr D said that if Dr Freeman did not help him then he would get Dr Freeman sacked. I asked* [him] *whether he felt able to draw on any support from other senior members of the Sky Team. Dr Freeman told me he did not feel able to ask Dr A for support as there was a very strained relationship between Mr D and Dr A. Dr Freeman told me this was on account of the fact that XXX'*. Adding that Dr A had a '*difficult relationship with Mr D'*.

185. However, other than Dr Freeman's assertion, there was no evidence that Mr D XXX. Indeed, both Mr B and Dr A provide unequivocal assertions to the contrary:

In Tribunal questions, Mr B was asked:

> *'Q: […] in your experience did you see or hear at any time any XXX by Mr D towards anybody?*
>
> *A No.'*

The Tribunal asked the same question of Dr A:

> *'Q: If I take you to* [a particular document], *it is in relation to many of the things we have heard this afternoon. I just want to ask you directly, if you go to the bottom paragraph – it is in relation to XXX. The question I wish to ask, quite directly, is have you ever seen Mr D XXX*
>
> *A: No.'*
>
> XXX,

186. In the document referred to above (where Dr A is recounting to the GMC his conversation with Dr Freeman's legal team), he is recorded as saying:

> *'[Dr A] advised that XXX he had not experienced anything of the kind from [Mr D] and, if anything, he had actually been very supportive XXX'*

187. The relevant part of a telephone note of that conversation reads:

> *'Q: So, you've not heard anything, and I am talking about gossip, feedback or any suggestion, that* [Mr D] *may have acted or said anything that could be XXX?*
>
> *A: No, I've found the opposite, if I'm honest.* […] *I can give a demonstration* […] *XXX'*

The accuracy of these documents was not disputed by Dr Freeman.

188. Strikingly, once Mr B and Dr A had addressed the Tribunal on XXX, Dr Freeman did not return to it in substance – save to claim (under cross-examination) that he had heard Mr D use what he considered to be a XXX slur XXX. This was despite having made XXX central, in his main statement, to why he had not been able to be candid with his colleagues.

189. Having considered the above carefully, the Tribunal considered that Dr Freeman had invented Mr D's alleged XXX. It was untrue and he knew it to be untrue.

190. Two points arise here.

191. First, this unfounded assertion undermines Dr Freeman's wider credibility as a witness of truth.

192. Second, by its removal, the foundation stone of his supposed rationale for needing to lie to his colleagues disappears. It places into doubt why, in the absence of XXX, Dr Freeman would have felt unable to discuss with Dr A any inappropriate pressure placed upon him by Mr D in relation to the demand for Testogel. Dr A was,

after all, both a hero and a friend to him, and someone who '*had his back*'. He confirmed, moreover, that Dr A had never once betrayed his confidence:

> *'Q: What I am trying to be clear about though is whether it is within your knowledge that he ever betrayed a confidence you shared with him, did he ever do that?*
>
> *A: Not that I had shared with him, never betrayed it.'*

193. It likewise leaves inexplicable why, when the confrontation with Mr B and Dr A occurred, Dr Freeman did not simply say, in effect, '*It is for a patient. Patient confidentiality*'.

194. In oral evidence, Dr Freeman said that Dr A would have got him to reveal the name of the patient:

> *'Q: Dr Freeman, when the packet was opened on 18 May, you had a copper-bottom answer when that package was opened, was to say to Professor A, "This is for a non-rider member of staff, I am not prepared to name them for reasons of patient confidentiality and I can assure you it is for nobody else and it is not for a rider". You had that copper-bottomed answered which you could have given him, couldn't you?*
>
> *A: Dr A, before he came to cycling, was a forensic psychiatrist at Rampton. He could drill down and find out what he wanted from who he wanted at whatever time, so I was aware of that and I was aware of being between a rock and a hard place with Mr D, so that's the course I took.*
>
> *Q: Are you saying that Professor A couldn't be relied upon as a consultant psychiatrist to respect your Hippocratic Oath to maintain patient confidentiality? Is that what you're saying of Dr A?*
>
> *A: I don't believe I'm saying that, but if I can try and explain it if you could ask me another question. What I'm trying to say is I'd never disrespect Professor A. I was in awe of him and I still am, and my friendship unfortunately has finished, to my regret, but Dr A was a very intelligent man and if he wanted to get information from you, I'm not saying he is breaking any Hippocratic Oath, but he would be able to get it from you. That was his skill. He could read minds.'*

195. The Tribunal had no evidence to confirm this. However, even if true, why (absenting the XXX issue) would any resultant disclosure concern Dr Freeman? Doctors can share patient information with fellow medics where appropriate, and there would have been no breach of professional ethics in the circumstances here.

196. Later in his evidence, expressing his reticence in a way that no longer relied upon the assertion of XXX, Dr Freeman introduced for the first time the assertion that Dr A had a predilection to gossip about *'celebrity'* patients. It was suggested that, if Dr A had known about Mr D's alleged erectile dysfunction, he might have shared such celebrity gossip '*with his team'*, as he had in the past. If this had always been part of Dr Freeman's case, it was not in his evidence in chief, nor had it been put to either Mr B or Dr A. No member of '*his team*' was called to corroborate the assertion.

197. Again, the Tribunal considered that Dr Freeman was being untruthful.

198. In conclusion, taking all these issues together, the Tribunal found that Dr Freeman's account of having ordered the Testogel for Mr D required it to believe too many implausible, unsupported assertions, as well as having to overlook further falsehoods, on the back of those Dr Freeman had already admitted.

199. Simply, on the balance of the evidence, the Tribunal did not believe him.

200. The Tribunal had noted documentation from 2017, presented as part of Dr Freeman's case, which appeared to suggest attempts by him to secure Mr D *'patient confidentiality'* waiver, and Mr D appearing to refuse the request (material that might, in other words, lend credence to the assertion that Mr D was always truly part of the story; these being honest attempts to gain his assistance). However, none of that material amounted to anything other than Dr Freeman reporting back to his solicitors (in respect of whom he had already admitted lying) exchanges he claimed to have had with Mr D. In light of the Tribunal's conclusion that Dr Freeman had not been a witness of truth, it mistrusted, as self-serving and uncorroborated, the accuracy of what he had told his solicitors.

201. Accordingly, the Tribunal was satisfied that the Testogel ordered by Dr Freeman was not for Mr D (being the non-rider to whom he said he had been referring in the UKAD interview).

202. The Tribunal determined that Dr Freeman's statement in paragraph 9a of the Allegation was untrue and he knew it to be untrue.

203. It therefore found paragraphs 10a and 10b of the Allegation proved.

Paragraph 11

204. In determining whether Dr Freeman has been dishonest in relation to paragraph 9a, the Tribunal applied the test established in the case *Ivey v Genting Casinos [2017] UKSC 67*.

205. This requires that the Tribunal must first ascertain (subjectively) the state of Dr Freeman's knowledge or belief as to the facts. The reasonableness of the belief is a matter of evidence going to whether he genuinely held the belief, but it is not a requirement that the belief must be reasonable.

206. Second, it must consider whether that conduct was dishonest by the (objective) standards of ordinary decent people. There is no requirement that Dr Freeman must appreciate that what they have done was, by those standards, dishonest.

207. Set against this, the Tribunal found that, having already determined that when Dr Freeman made the said statement to UKAD on 17 February 2017 it was untrue and that he knew it to be untrue, his conduct therein was dishonest by the standards of ordinary decent people.

208. Therefore, the Tribunal found paragraph 11 of the Allegation proved.

Paragraph 12a

209. For the reasons set out above, the Tribunal was satisfied that at the time Dr Freeman placed the order, and at the time he obtained the Testogel, it was not clinically indicated for Mr D (the 'non-athlete member of staff' referred to in paragraph 9a).

210. The Tribunal was also satisfied that, in the event Dr Freeman had been given reason to address his mind to the issue at the time, he would have known this (since he had been acting as Mr D's 'private GP' ever since he started working at British Cycling).

211. However, the Tribunal takes the expression '*when you knew*' in paragraph 12a to mean that the information was actually within Dr Freeman's contemplation at the time he ordered and received the Testogel.

212. The Tribunal found instead, though, given its conclusion in relation to paragraph 10, that Mr D was entirely irrelevant to Dr Freeman's consideration at those times; he simply was not within Dr Freeman's purview.

213. It is on that specific basis that the Tribunal found paragraph 12a of the Allegation not proved.

Paragraph 12b

214. Reflecting upon the totality of the evidence, the Tribunal has determined that Dr Freeman placed the order and obtained the Testogel knowing or believing it was

to be administered to an athlete to improve their athletic performance. Therefore, it found paragraph 12b proved.

215. In coming to that decision, the Tribunal relied upon the following.

216. On 16 May 2011, Dr Freeman ordered for delivery to the Velodrome the delivery of a drug, Testogel.

217. Testogel was a drug prohibited under the World Anti-Doping Agency List of Prohibited Substances and Methods. It was one that could be, and in the past had been, used to increase the athletic performance of cyclists.

218. At the time he ordered it, he was team doctor to an elite team of professional cyclists at British Cycling and Team Sky.

219. On his CV he describes himself as having a *'commitment to strong anti-doping* policy' and being a member of the anti-doping working group. In other words, he knew about doping in his sport.

220. In understanding the nature of Testogel, the Tribunal was assisted by expert witness Professor T. He gave clear, cogent and compelling evidence to explain its use, misuse and potential effects on athletic performance:

> *'Testogel is the commercial name of the preparation of testosterone formulated as a gel* […] *the product is a transparent or slightly opalescent, colourless gel packaged in sachets of 5 grams each containing 50 milligrams of testosterone* […] *Testosterone is an androgenic anabolic steroid. It is one of the main endogenous androgens in the male. It will promote muscle growth, reduce muscle catabolism and hence aid recovery and may also have a behavioural effect that will increase competitiveness'*
>
> *'It might therefore be used in an attempt to increase athletic performance in an elite professional cyclist and is specifically mentioned by name as a prohibited substance in the World Anti-Doping (WADA) Prohibited List* […]'

221. He referenced documented cases where testosterone gel had been used in the past, such as that of professional road racing cyclist Floyd Landis.

222. He continued, '*there are a variety of reasons why even low doses of testosterone may be misused in sport to gain an unfair advantage'*. In discussing 'micro-dosing' and the 2015 UCI report, Professor T continued:

> *'The term micro-dosing is commonly used in sport to refer to the use of Prohibited Substances in smaller than usual amounts. It has been used to refer to* […] *testosterone. In the case of testosterone, it is used to indicate*

> *doses in the order of milligrams rather than tens of milligrams or more. The 2015 UCI report comments on the use of testosterone patches and gels* […] *in order to avoid detection.'*
>
> *'The use of Testogel or testosterone administered in gel form is extremely easy and requires no medical knowledge or training. It is simply applied to the skin in a thin layer and allowed to dry for a few minutes […].'*

223. In terms of its likelihood of detection, when micro-dosed, Professor T indicated, *'If used once daily,* [it was] *unlikely to be detected in a routine anti-doping test prior to the implementation of the athlete biological passport steroid module in recent years, i.e., after 2011'.* He explains why this is so. The Tribunal was presented with no expert evidence to challenge his explanation.

224. When confronted on 18 May 2011 about the delivery of the prohibited substance to the velodrome, Dr Freeman admits having lied to his two colleagues, Mr B and Dr A. He falsely claimed the Testogel had been sent in error. He said he would arrange for its return to Fit4Sport.

225. Dr A requested that Dr Freeman should obtain a letter from Fit4Sport '*stating it was a clerical error on their part and that he had not ordered it, which is what he told me*.' He indicates that approximately a week later, in Mr B's presence, Dr Freeman produced such a letter, albeit he would not release it into Dr A's charge. (Mr B confirms that Dr A made that immediate request for a letter and confirms too that, to the best of his recollection, Dr Freeman did indeed produce such a letter shortly thereafter.)

226. Although on 18 May 2011 Dr Freeman could have left the Testogel in the Velodrome reception for collection, instead he says he took it home with him.

227. Despite claims to the contrary to various people on different occasions (claims he now admits were deliberately untruthful), he never subsequently returned the Testogel to Fit4Sport.

228. The prohibited substance has never been seen since. Only for the first time during this hearing did Dr Freeman assert publicly that he destroyed it the same night that it was delivered. He said he took it home and washed it down the sink.

229. In the months between May and October 2011, Dr A says he made '*repeated requests*' to Dr Freeman for a copy of the Fit4Sport letter, but he did not get one until October:

> a. '[…] *at that point I had suggested that I wrote to the company myself and that is when he approached me and I received the email hard copy'*.

230. Although he described Dr A as a man of absolute integrity and honesty; Dr Freeman denied the chain of events that Dr A advanced. He insisted instead that Dr A did not ask for a letter from Fit4Sport until October. Under questions from the Tribunal, Dr Freeman could think of no reason why Dr A should have been mistaken in the entirety of his recollection. The Tribunal preferred Dr A's account as the honest and accurate one.

231. Dr Freeman did though admit the following:

- Under pressure from Dr A to provide proof that the Testogel had been returned, he had entreated a third party (Ms C) to write an email relating to the drug, claiming it had been sent to him in error, had been returned, and that it would be destroyed – when he knew none of this was true; and that

- Dr Freeman showed the resultant email to his two colleagues in October 2011 as evidence that the drug had been sent to him in error, had been returned and that it would be destroyed – again, knowing none of this was true.

He admitted to acting dishonestly in these regards. The Tribunal noted that Dr Freeman went on to provide a copy of that email to Dr A for auditing purposes.

232. Dr Freeman also admitted that, six years later, when he was interviewed by UKAD on 17 February 2017, he again acted dishonestly; repeating the lie that the Testogel had been returned to Fit4Sport.

233. Significantly, during the course of that interview, Dr Freeman received disclosure that Ms C had been interviewed by UKAD:

> *'Q148 XXX: Because Ms C has told me that you asked her to write this email to you and she is clear that the error was not theirs and that you asked her to formulate this email to send to her, why did you do that?*
>
> *[XXX asks a question for clarification, and then Dr Freeman answers]*
>
> *A150 Mr Freeman: I've got nothing further to add on my statement about returning Testogel to Fit for Sport for destruction and having it recorded.'*

234. It was after the introduction of this disclosure that Dr Freeman shifted his position. Abandoning the lie that the Testogel had been sent to the Velodrome in error, etc., Dr Freeman has asserted ever since that the Testogel was instead ordered for Mr D.

235. However, for the reasons the Tribunal has set out in relation to paragraph 10, it rejected this account. It considered it to be an elaborate falsehood.

236. The position therefore is this. In May 2011, Dr Freeman, the team doctor for a team of elite cyclists and a member of the anti-doping working group, ordered a doping *'drug of choice'* for that sport. Upon its arrival he was dishonest about why it had been sent, removed it from the Velodrome, and it was never seen again. The Tribunal found that Dr Freeman has been dishonest in its regard ever since.

237. Much of his dishonesty is captured in the admitted matters, and in those facts now found proved, but there are other areas where the Tribunal also considers his account has been untruthful. For example, Dr Freeman had insisted forcefully – and on the basis of detailed argument - that the 2017 'Testogel' interview Dr A undertook with a national newspaper had not occurred at his bidding (as Dr A had claimed) but wholly of Dr A's own volition. Finally, though, under questions from the Tribunal, he abandoned that position, stating '*I was confused and mistaken*'. The Tribunal considered that his account of this in his main statement (and as renewed in his undated third statement) was another falsehood.

238. The Tribunal recognised fully that Testogel had other uses. As Professor T confirmed, Testogel could be used by, for example, bodybuilders. However, no such use was suggested here. Only two explanations had been advanced by Dr Freeman: 'error' (which he abandoned) and 'Mr D' (which the Tribunal rejected).

239. The Tribunal also took carefully into account the submission that, given Dr Freeman's intellect, he could easily have sourced the Testogel via other means - ones less easy to detect. According to Professor T, it was available on the internet and by other unlicensed methods. A doctor could obtain it from a general pharmacist. In other words, the fact that he arranged for it to be delivered to the Velodrome - properly auditable, where others could open the package (and where he knew that they could) - was a contra-indication to the GMC's assertion that the Testogel had been ordered in the knowledge and belief alleged in paragraph 12b.

240. However, the Tribunal recognised that people make mistakes, particularly in difficult circumstances (and the Tribunal has in mind the domestic pressures in his life at that time). Additionally, Dr Freeman's immediate behaviour, when confronted with the Testogel, belied the force of Ms O'Rourke's submission, in the Tribunal's view.

241. Overall, then, taking all those factors into account, and bearing in mind the breadth of Dr Freeman's dishonesty and the number of people he had pulled into it (Ms C, Dr A and Mr D), the Tribunal found his conduct incapable of innocent explanation. It was clear that, on the balance of probabilities, the inference could properly be drawn that when Dr Freeman placed the order and obtained the

Testogel, he knew or believed it was to be administered to an athlete to improve their athletic performance.

242. In reaching that determination, the Tribunal was satisfied it can safely exclude, as less than probable, any other possible explanations for Dr Freeman's conduct in the particular circumstances.

243. Accordingly, the Tribunal found paragraph 12b of the Allegation proved.

244. Finally, the Tribunal has not referred to any of the documentary materials introduced by Mr Jackson for the first time during Dr Freeman's cross examination. It confirms having considered those materials carefully, and the evidence Dr Freeman gave in their regard. However, bearing in mind the nature of these documents, and the absence of relevant witness statements, or witnesses themselves, to speak to their contents, the Tribunal determined no weight could properly and safely be attached to the material in such circumstances. For the avoidance of doubt, therefore, those materials, and the GMC submissions postulated on the basis of them, played no part in the Tribunal's decision.

Paragraph 13

245. On the basis of the facts found proved, as detailed above, coupled with those facts Dr Freeman had already admitted in relation to the Testogel, the Tribunal was satisfied it could infer from those facts the existence of another fact; namely that, on the balance of probabilities, the motive for Dr Freeman's actions as outlined in paragraphs 3 to 11 (inclusive) of the Allegation was to conceal his conduct as outlined in the Allegation specifically at paragraph 12b.

246. The Tribunal therefore found paragraph 13 of the Allegation proved in relation to 12b.

The Tribunal's Overall Determination on the Facts

247. The Tribunal has determined the facts as follows:

Order of a banned substance

1 On 16 May 2011, you ordered for delivery from Fit4Sport Limited to the Manchester Velodrome 30 sachets of Testogel ('the Order'). **Admitted and found proved**

2 At the time of order referred to in paragraph 1 above, Testogel was (and remains) prohibited on the World Anti-Doping Agency List of Prohibited Substances and Methods. **Admitted and found proved**

3 On 18 May 2011, when the Order had been received at Manchester Velodrome, you advised Dr A and Mr B that:

a you had not made the Order; **Admitted and found proved**

b the Order had been sent in error; **Admitted and found proved**

4 The statements you made as outlined at Paragraph 3 above:

a were untrue; **Admitted and found proved**

b you knew to be untrue. **Admitted and found proved**

5 On a date in October 2011 you contacted Ms C at Fit4Sport Limited and asked her to send you written confirmation ('the Email') which stated that the Order:

a had been sent in error by Fit4Sport Limited; **Admitted and found proved**

b had been returned to Fit4Sport Limited; **Admitted and found proved**

c will be destroyed by Fit4Sport Limited; **Admitted and found proved**

6 When you asked Ms C to send the Email, you knew that the Order had not been:

a sent in error by Fit4Sport Limited; **Admitted and found proved**

b returned to Fit4Sport Limited; **Admitted and found proved**

c destroyed by Fit4Sport Limited; **Admitted and found proved**

7 On a date in October 2011, you showed the Email to Dr A and Mr B to evidence that the Order had been:

a sent in error by Fit4Sport Limited; **Admitted and found proved**

b returned to Fit4Sport Limited; **Admitted and found proved**

c (or would be) destroyed by Fit4Sport Limited. **Admitted and found proved**

8 When you showed the Email to Dr A and Mr B you knew that the content of the Email was untrue. **Admitted and found proved**

9 During an interview with UK Anti-Doping on 17 February 2017, you stated that the Testogel had been:

a ordered for a non-athlete member of staff; **Admitted and found proved**

b returned to Fit4Sport Limited. **Admitted and found proved**

10 The comments as outlined at Paragraph 9 above:

a were untrue; **Admitted and found proved in relation to 9b. Determined and found proved in relation to 9a**

b you knew to be untrue. **Admitted and found proved in relation to 9b. Determined and found proved in relation to 9a.**

11 Your conduct as outlined at paragraphs 3, 5, 7 and 9 above was dishonest by reasons of paragraphs 4, 6, 8 and 10. **Admitted and found proved in relation to 3, 5, 7 and 9b. Determined and found proved in relation to 9a.**

12 ~~Your motive for placing the Order was to obtain Testogel to administer to an athlete to improve their athletic performance.~~

<u>You placed the Order and obtained the Testogel:</u>

<u>a when you knew it was not clinically indicated for the non-athlete member of staff as described at paragraph 9a above;</u> **Amended under Rule 17(6). Not proved.**

<u>b knowing or believing it was to be administered to an athlete to improve their athletic performance.</u> **Amended under Rule 17(6). Determined and found proved.**

13 The motive for your actions as outlined at Paragraphs 3 to 11 (inclusive) above was to conceal your ~~motive~~ conduct as outlined at paragraph 12 above. **Amended under Rule 17(6). Determined and found proved in relation to 12b.**

Clinical concerns

14 When Team Doctor for athletes at British Cycling Federation ('BC') and Tour Racing / Team Sky ('Team Sky'), you provided medical treatment that did not constitute first aid to non –athlete members of staff:

a without access to the medical records for those members of staff you treated; **Admitted and found proved**

b when they should instead have been referred to their general practitioner. **Admitted and found proved**

15 You failed to inform Patient A's GP of:

a what medication you had prescribed to Patient A; **Admitted and found proved**

b the reasons for prescribing medication to Patient A. **Admitted and found proved**

16 You failed to inform Patient B's GP of:

a what medication you had prescribed to Patient B; **Admitted and found proved**

b the reasons for prescribing medication to Patient B. **Admitted and found proved**

17 You failed to inform Patient C's GP of:

a what medication you had prescribed Patient C; **Admitted and found proved**

b the reasons for prescribing the medication to Patient C. **Admitted and found proved**

Record management

18 Your role as team doctor at BC and Team Sky required you to use electronic medical record keeping software (namely Performance Data Management System at BC and Drop Box at Team Sky) so that treating physicians always had access to relevant medical information of Team Sky and BC athletes anywhere in the world. **Admitted and found proved**

19 You failed to maintain an adequate record management system in that you failed to:

a implement an adequate medicine management policy, in that you did not adequately record details of stored drugs, including:

i stock checks; **Admitted and found proved**

ii medicine use; **Admitted and found proved**

iii expiry dates; **Admitted and found proved**

iv dosages; **Admitted and found proved**

v quantity; **Admitted and found proved**

vi batch numbers; **Admitted and found proved**

b record details of drugs once prescribed, including:

i start date of treatment; **Admitted and found proved**

ii dose; **Admitted and found proved**

iii quantity **Admitted and found proved**

iv batch number; **Admitted and found proved**

c consistently record patient records on:

i the Performance Data Management System at BC; **Admitted and found proved**

ii in the alternative to 19.c.i, in hard copy form. **Admitted and found proved**

d record on patient records or elsewhere medication you had:

i ordered; **Admitted and found proved**

ii stored; **Admitted and found proved**

iii prescribed. **Admitted and found proved**

e maintain a consistent and organised approach to the storage of medical records in that when you did create records you stored them:

i on a number of different laptops; **Admitted and found proved**

ii in hard copy form in piles of loose paper. **Admitted and found proved**

20 Your management of prescription-only medication ('POM') was inappropriate in that you failed to:

a issue a prescription for relevant medication; **Admitted and found proved**

b keep an adequate record of stored POM; **Admitted and found proved**

c keep an adequate record of dispensed POM. **Admitted and found proved**

21 On the evening of 27 / 28 August 2014, a British Cycling laptop containing records of a professional cyclist ('the Laptop') was stolen from you. **Admitted and found proved**

22 You failed to ensure that the records on the Laptop could be retrieved in that you:

a did not back up the records:

i electronically; **Admitted and found proved**

ii in hard copy form. **Admitted and found proved**

b stored the records in a manner only accessible to you. **Admitted and found proved**

Determination on Impairment - 18/03/2021

1. The Tribunal now has to decide in accordance with Rule 17(2)(l) of the Rules whether, on the basis of the facts which it has found proved, Dr Freeman's fitness to practise is impaired by reason of misconduct.

The Evidence

2. The Tribunal has taken into account all the evidence received during the facts stage of the hearing, both oral and documentary.

3. In addition, The Tribunal received the following documentary evidence on behalf of Dr Freeman:

- Testimonials in support of Dr Freeman;
- Certificate of attendance at an '*Introduction to Confidentiality'* course dated 25 February 2021;
- A placement structured report; and
- An appraisal report dated 13 March 2020.

Submissions

<u>On behalf of the GMC</u>

4. Mr Jackson provided written and oral submissions on behalf of the GMC. He referred the Tribunal to relevant caselaw and submitted that Dr Freeman's fitness to practise is currently impaired by reason of his misconduct.

5. Mr Jackson referred to the Tribunal's earlier determination on facts, in particular the serious finding that Dr Freeman placed an order of Testogel knowing or believing that it was to be given to an athlete to improve their athletic performance. Mr Jackson submitted that, coupled with the facts already admitted, Dr Freeman's actions amounted to serious misconduct.

6. Whilst Mr Jackson acknowledged the positive testimonials provided on Dr Freeman's behalf, he submitted that these need to be considered in light of the admissions of dishonesty, the Tribunal's findings at the facts stage, and the absence of any updated reflections.

7. Mr Jackson submitted that in the time which has elapsed since these events, Dr Freeman has only showed limited insight and has taken limited steps to remediate and address the source of his misconduct. Therefore, he concluded that Dr Freeman's fitness practise is currently impaired by reason of his misconduct.

On behalf of Dr Freeman

8. Ms O'Rourke stated that, given the Tribunal's earlier determination on facts, she did not have any submissions to make on behalf of Dr Freeman at this stage.

The Tribunal's Determination

9. Whilst the Tribunal has borne in mind the submissions made, the decision as to whether Dr Freeman's fitness to practise is impaired is a matter for this Tribunal exercising its own judgment.

10. It is clear from the design of section 35c of the Medical Act 1983 that the Tribunal must adopt a two-stage approach:

> a. First, it must decide whether one of the circumstances set out in the section is present (and the relevant one here is misconduct);
>
> b. Second, if misconduct is present, it must then go on to determine whether, as a result, fitness to practise is impaired. Thus, it may be that, despite Dr Freeman having been guilty of misconduct (if that is what the Tribunal finds), it may decide that his fitness to practise is not impaired. (*GMC v Cheatle [2009] EWHC 645 [Admin] at paragraph 19*)

Misconduct

11. The Tribunal reminded itself that misconduct has been defined by the Privy Council in the case of *Roylance v GMC* as *'a word of general effect, involving some act or omission which falls short of what would be proper in the circumstances.'* In that case, the Privy Council went on to say that *'The standard of propriety may often be found by reference to the rules and standards ordinarily required to be followed by a medical practitioner in the particular circumstances'*, (*Roylance v GMC (No.2) [2000] 1 AC 311*).

12. Mere negligence does not amount to misconduct unless particularly serious. A single act/omission may amount to misconduct if particularly grave but is less likely to amount to misconduct than multiple acts/omissions (*GMC v Calhaem [2007] EWHC 2606 (Admin) at paragraph 39*).

13. For the doctor's conduct to amount to misconduct, *'it must be linked to the practice of medicine or* [else it must be] *conduct that otherwise brings the profession into disrepute, and it must be serious'*. (*GMC v Calhaem [2007] EWHC 2606 (Admin) at paragraph 36*).

14. The behaviour must involve sufficiently serious misconduct in the exercise of professional practice such that it can properly be described as misconduct going to fitness to practise.

15. As to seriousness, this must be given its proper weight: it is conduct which would be regarded as deplorable by fellow practitioners *(Nandi v GMC [2004] EWHC 2317 (Admin) at paragraph 31, approved by Meadow v GMC [2007] QB 462 at paragraph 200).*

16. Reflecting on these matters, the Tribunal noted that Dr Freeman's actions in ordering the Testogel, and his knowledge or belief in relation to its ordering, was itself very serious and amounted to misconduct.

17. In addition, though, the Tribunal considered that Dr Freeman's conduct surrounding the order of the Testogel amounted to a long and considered pattern of very serious dishonesty. In the course of that dishonesty, as set out in paragraphs 1-13 of the Allegation, and as commented upon in detail by the Tribunal in its facts determination, Dr Freeman abused the professional trust of colleagues and friends (Dr A, Mr B, Ms C), publicly traduced the reputation of another professional (Mr D), and deliberately misled UKAD, among other matters. His dishonesty continued up to and during the hearing itself. This, too, was serious misconduct.

18. The Tribunal went on to consider the clinical concerns in relation to Dr Freeman's conduct, as set out at paragraphs 14 to 17 of the Allegation. These were matters admitted by Dr Freeman. The Tribunal noted the report provided by expert witness, Dr U. In the Tribunal's determination, Dr Freeman's behaviour in relation to any one of the three patients identified would be conduct that fell below the required professional standard. Taken together, it amounted to a pattern of behaviour sufficiently serious to be characterised to Misconduct.

19. Likewise, The Tribunal considered Dr Freeman's record management, as set out in paragraphs 18 to 22 of the Allegation, was sufficiently serious to amount to Misconduct. The Tribunal again had regard to the expert evidence; in particular, that of Dr U. He described the standard of Dr Freeman's note-keeping as being '*seriously below that expected',* and says Dr Freeman's control of medicines and prescribing was *'severely below the expected standard'* for a doctor working in sports medicine. Dr U concludes that '*the overall standard of the aspects of Dr Freeman's practice that I have looked at is seriously below the standard to be expected*… [and]… *his practice gives severe cause for concern'.*

20. Taking into account all these matters, the Tribunal considered that Dr Freeman was in breach of a number of aspects of Good Medical Practice. The following are engaged.

> From the 2006 edition of Good medical Practice 'GMP' (in relation to the dishonesty from 2011):

'1 Patients need good doctors. Good doctors make the care of their patients their first concern: they are competent, keep their knowledge and skills up to date, establish and maintain good relationships with patients and colleagues, are honest and trustworthy, and act with integrity.

56 Probity means being honest and trustworthy, and acting with integrity: this is at the heart of medical professionalism.

57 You must make sure that your conduct at all times justifies your patients' trust in you and the public's trust in the profession.'

From the 2013 edition of GMP, the following paragraphs:

'1 Patients need good doctors. Good doctors make the care of their patients their first concern: they are competent, keep their knowledge and skills up to date, establish and maintain good relationships with patients and colleagues, are honest and trustworthy, and act with integrity and within the law.

19 Documents you make (including clinical records) to formally record your work must be clear, accurate and legible. You should make records at the same time as the events you are recording or as soon as possible afterwards.

20 You must keep records that contain personal information about patients, colleagues or others securely, and in line with any data protection requirements.

21 Clinical records should include:

a. relevant clinical findings

b. the decisions made and actions agreed, and who is making the decisions and agreeing the actions

c. the information given to patients

d. any drugs prescribed or other investigation or treatment

e. who is making the record and when.

22 You must take part in systems of quality assurance and quality improvement to promote patient safety. This includes:

a. taking part in regular reviews and audits of your own work and that of your team, responding constructively to the outcomes, taking steps

to address any problems and carrying out further training where necessary

b. regularly reflecting on your standards of practice and the care you provide

25 You must take prompt action if you think that patient safety, dignity or comfort is or may be seriously compromised.

b. If patients are at risk because of inadequate premises, equipment or other resources, policies or systems, you should put the matter right if that is possible. You must raise your concern in line with our guidance and your workplace policy. You should also make a record of the steps you have taken.

44 You must contribute to the safe transfer of patients between healthcare providers and between health and social care providers. This means you must:

a. share all relevant information with colleagues involved in your patients' care within and outside the team, including when you hand over care as you go off duty, and when you delegate care or refer patients to other health or social care providers

65 You must make sure that your conduct justifies your patients' trust in you and the public's trust in the profession.

68 You must be honest and trustworthy in all your communication with patients and colleagues. This means you must make clear the limits of your knowledge and make reasonable checks to make sure any information you give is accurate.

72 You must be honest and trustworthy when giving evidence to courts or tribunals. You must make sure that any evidence you give or documents you write or sign are not false or misleading.

a You must take reasonable steps to check the information is correct.

b You must not deliberately leave out relevant information.'

21. The Tribunal also had regard to the GMC guidance on *'Good practice in prescribing and managing medicines and devices'* [2013 edition] and considered the following paragraphs were engaged in this case:

> *'14 You should prescribe medicines only if you have adequate knowledge of the patient's health and you are satisfied that they serve the patient's needs.*
>
> *17 Wherever possible you must avoid prescribing for yourself or anyone with whom you have a close personal relationship.*
>
> *19 If you prescribe for yourself or someone close to you, you must:*
>
> > *a. make a clear record at the same time or as soon as possible afterwards. The record should include your relationship to the patient (where relevant) and the reason it was necessary for you to prescribe.*
> >
> > *b. tell your own or the patient's general practitioner (and others treating you or the patient, where relevant) what medicines you have prescribed and any other information necessary for continuing care, unless (in the case of prescribing* for somebody close to you) *they object.'*

22. In all the circumstances, the Tribunal determined that Dr Freeman's actions would be considered as deplorable by members of the public and fellow practitioners.

23. The Tribunal concluded that Dr Freeman's actions were sufficient to amount to serious misconduct.

Impairment

24. In considering this issue the Tribunal reminded itself that:

a. The question of whether Dr Freeman's fitness to practise is impaired is posed, and is to be answered, in the present tense; the Tribunal looks forward not back. However, in order to form a view as to the fitness of a person to practise today, the Tribunal will have to take into account the way in which Dr Freeman has acted, or failed to act, in the past (*Meadow v GMC [2006] EWCA Civ 1390*);

b. Case law has established that it must be 'highly relevant' in determining if a doctor's fitness to practise is impaired 'that, first, his or her conduct which led to the charge is easily remediable; that, second, it has been remedied; and, third, that it is highly unlikely to be repeated' (*R (on the application of Cohen) v GMC [2008] EWHC 581 [Admin]);*

c. The attitude of Dr Freeman to the matters which give rise to the specific allegation against, is (in principle) something which can be

taken into account either in his favour, or against him, by the Tribunal. (*Nicholas- Pillai v GMC [2009] EWHC 1048 [Admin]).*

25. In relation to (b) above, the Tribunal considered that Dr Freeman's conduct in relation to *clinical concerns* and *record management* was remediable. It noted the progress Dr Freeman had made in these regards, taking into account the testimonial and other evidence provided. It noted too (per (c)) Dr Freeman's admissions; as well as his own reflections on these themes, as provided in his September 2019 statement. The Tribunal would have welcomed more evidence - including further reflection from Dr Freeman himself – in order to assess the extent of his insight and remediation. Absenting this, the Tribunal considered it could find only Dr Freeman had developing insight, but it could not determine that the process was complete.

26. The Tribunal next considered Dr Freeman's conduct in relation to the ordering of the Testogel, and his many acts of dishonesty that followed in its train. In the Tribunal's determination, this was particularly egregious conduct. More, it was conduct in respect of which the Tribunal considered he had undertaken no serious process of reflection or remediation.

27. While noting that Dr Freeman had made admissions to some of the dishonesty, and had offered written reflections in these regards, The Tribunal considered that the purpose of these admissions were to enable him to continue to perpetuate the bigger deception which continued into this hearing, as set out in the Tribunal's facts determination. For these reasons, the Tribunal determined there remained a risk of further such behaviour by Dr Freeman.

28. In considering the question of impairment more generally, the Tribunal went on to remind itself that any approach to the issue of impairment must take into account the need to protect the individual patient, and the collective need to maintain confidence in the profession, as well as declaring and upholding proper standards of conduct and behaviour *(R (on the application of Cohen) v GMC [2008] EWHC 581 (Admin) at paragraph 62).*

29. The Tribunal also noted that there are occasions when a finding of impairment of fitness to practise may be justified on the grounds that it is necessary to reaffirm clear standards of professional conduct so as to maintain public confidence in the practitioner and in the profession. In such a case, the efforts made by the medical practitioner in question to address his behaviour for the future may carry less weight very much than in a case where the misconduct consists of clinical errors or incompetence. (*Yeong v GMC [2009] EWHC 1923 at paragraphs 50 and 51*).

30. Finally, the Tribunal reminded itself of the question it should ask, namely *'do the findings of fact in respect of this doctor's misconduct show that his fitness to practise is impaired in the sense that he;*

a. has in the past acted or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or

b. has in the past brought and/or liable in the future to bring the medical profession into disrepute; and/or

c. has in the past breached or liable in the future to breach one of the fundamental tenets of the medical profession; and/or

d. has in the past acted dishonestly and/or is liable to act dishonestly in the future.' (*CHRE v NMC & Grant*, quoting Dame Janet Smith in paragraph 25.67 in her Fifth Report from Shipman).

31. The Tribunal determined that all four limbs in relation to *Grant* above were engaged in this case.

32. The Tribunal bore in mind that Dr Freeman's misconduct involved a number of significant elements, including serious dishonesty, as well as behaviour which could have placed patients at unwarranted risk of harm. It concluded that public confidence in the profession would be undermined if a finding of impairment were not made.

33. The Tribunal has therefore determined that Dr Freeman's fitness to practise is impaired by reason of his misconduct.

Determination on Sanction - 19/03/2021

1. Having determined that Dr Freeman's fitness to practise is impaired by reason of misconduct, the Tribunal now must decide in accordance with Rule 17(2)(n) of the Rules on the appropriate sanction, if any, to impose.

The Evidence

2. The Tribunal has considered evidence received during the earlier stages of the hearing, where relevant, to reaching a decision on sanction. No further evidence was adduced at this stage of the proceedings.

Submissions

<u>On behalf of the GMC</u>

3. Mr Jackson provided written and oral submissions on behalf of the GMC. He referred the Tribunal to the relevant paragraphs of the Sanctions Guidance (November

2020 edition) 'the SG'. He submitted that the appropriate and proportionate sanction in this case is to erase Dr Freeman's name from the Medical Register.

4. He reminded the Tribunal that it should take into account any mitigating and aggravating factors and give the appropriate weight to the positive testimonials that it received at the impairment stage.

5. He submitted that Dr Freeman's actions amount to serious and sustained dishonesty stemming from the ordering of the Testogel in 2011. Since then, Dr Freeman's dishonesty has continued. It included lying to UKAD in 2017, lying to his solicitors, lying to an examining psychiatrist, and being untruthful in his evidence to this Tribunal.

6. Given the seriousness of Dr Freeman's misconduct, the seriousness of his breaches of GMP, his persistent lack of insight and the significant risk of repetition, Mr Jackson submitted that Dr Freeman's name should be erased from the Medical Register.

On behalf of Dr Freeman

7. Ms O'Rourke stated that she did not have any submissions to make on behalf of Dr Freeman at this stage.

The Tribunal's approach to Sanction

8. The decision as to the appropriate sanction to impose, if any, is a matter for this Tribunal exercising its own judgement.

9. In reaching its decision, the Tribunal has taken account of the SG and GMP. It has borne in mind that the purpose of a sanction is not to be punitive, but to protect patients and the wider public interest, although it may have a punitive effect.

10. Throughout its deliberations, the Tribunal applied the principle of proportionality, balancing Dr Freeman's interest with the public interest. It has also taken into account the statutory overarching objective.

11. The Tribunal has already given detailed determinations on facts and impairment and has taken those matters into account during its deliberations on sanction.

Mitigating and Aggravating factors

12. The Tribunal identified the following mitigating factors in this case:

- In relation to the *clinical concerns* and *record management* issues, Dr Freeman has shown some insight and has undertaken some steps towards remediation.

The Tribunal noted his apologies, reflections and contrition, as captured in his September 2019 statement. In addition, it bore in mind the passage of time since those *clinical concerns* and *record management* issues arose. Dr Freeman has since re-trained and has been working as a GP. His recent work has been the subject of praise by professional colleagues. No new concerns have been raised.

- More generally, the Tribunal noted that, prior to the matters found proved, Dr Freeman was of good character and had a long and distinguished medical career. No other fitness to practise concerns have been brought to the Tribunal's attention.

- Finally, the Tribunal acknowledged that around the time of ordering the Testogel in April/May 2011 Dr Freeman was going through difficult personal circumstances and that he was suffering then, as he suffers now, from a chronic health condition (Bipolar Affective Disorder Type II).

13. The Tribunal identified the following aggravating factors:

- While the Tribunal has found developing insight, and a journey towards remediation in relation to *clinical concerns* and *records management*, the Tribunal also noted that Dr Freeman's admissions and acceptance of blame in these regards was still incomplete at the time he made his statement of September 2019. Therein, he denied various facts relating to his medical practice, only accepting them at the start of this hearing. In other words, it could not be characterised as a *'timely development'* of insight.

- In relation to the ordering of the Testogel, and the long and elaborate pattern of dishonesty that has ensued since, the Tribunal considers Dr Freeman has displayed no real insight. As such, the risk of further dishonesty must remain a significant one.

- The extent of his dishonesty in relation to the Testogel – the number of lies Dr Freeman has told, the range of people and professional bodies to whom he has told them, the sustained period over which they have been told, and the number of people whose professional reputation he was prepared to damage to save his own - was a particularly significant aggravating factor in the case.

- The Tribunal noted that Ms C said she trusted Dr Freeman precisely because he was a doctor. He abused that trust. Dr A, meanwhile, trusted in the probity of his friend and colleague, Dr Freeman, on more than one occasion; and, in doing so, innocently and unwittingly placed his own reputation at risk. In relation to both people, Dr Freeman exploited their reputation as individuals of truth and integrity in order to protect himself.

- Another significant feature of his dishonesty was the extent to which Dr Freeman was prepared to put to use private information he held on professional colleagues (XXX, Mr D's subsequent clinical needs) in order to facilitate his fabricated account. The Tribunal considered that the public and the profession would regard such conduct as deplorable.

- Finally, the Tribunal bore in mind the context in which Dr Freeman ordered the Testogel. At the time of his misconduct, Dr Freeman was undertaking a high-profile medical role for national sporting organisations (British Cycling and Team Sky); organisations that were operating directly in the public eye. By his actions, he has created a reputational risk for organisations who had trusted in his honesty and professionalism.

The Tribunal's Determination on Sanction

No action

14. In reaching its decision as to the appropriate sanction, if any, to impose in Dr Freeman's case, the Tribunal first considered whether to conclude the case by taking no action. Taking no action following a finding of impaired fitness to practise would only be appropriate in exceptional circumstances.

15. The Tribunal determined that the seriousness of its findings required the imposition of a sanction. It determined that there were no exceptional circumstances, and it would not therefore be sufficient, proportionate or in the public interest to conclude this case by taking no action.

Conditions

16. The Tribunal next considered whether it would be sufficient to impose conditions on Dr Freeman's registration. It bore in mind that any conditions imposed should be appropriate, proportionate, workable and measurable.

17. It had regard to paragraph 81 of the SG which states:

> *'81 Conditions might be most appropriate in cases:*
>
> *a. involving the doctor's health*
>
> *b. involving issues around the doctor's performance*
>
> *c. where there is evidence of shortcomings in a specific area or areas of the doctor's practice*

> *d. where a doctor lacks the necessary knowledge of English to practise medicine without direct supervision.'*

18. While the Tribunal recognised that paragraph 81 did not exhaustively limit the circumstances in which conditions might be appropriate; nevertheless, on the facts of this case, conditions would not be appropriate, proportionate or workable. They would be insufficient to meet the public interest and to maintain proper professional standards of conduct for the members of the profession.

19. The Tribunal has, therefore, determined that it would not be sufficient to direct the imposition of conditions on Dr Freeman's registration.

Suspension

20. The Tribunal then went on to consider whether imposing a period of suspension on Dr Freeman's registration would be appropriate and proportionate. The Tribunal had regard to paragraphs 92 and 93 of the SG, which state:

> '92 *Suspension will be an appropriate response to misconduct that is so serious that action must be taken to protect members of the public and maintain public confidence in the profession. A period of suspension will be appropriate for conduct that is serious but falls short of being fundamentally incompatible with continued registration (i.e., for which erasure is more likely to be the appropriate sanction because the tribunal considers that the doctor should not practise again either for public safety reasons or to protect the reputation of the profession).*
>
> *93 Suspension may be appropriate, for example, where there may have been acknowledgement of fault and where the tribunal is satisfied that the behaviour or incident is unlikely to be repeated. The tribunal may wish to see evidence that the doctor has taken steps to mitigate their actions...'*

21. The Tribunal went on to consider all of the paragraphs in the SG relating to suspension, including those factors listed at paragraph 97; factors which, if present, would indicate suspension might be appropriate.

22. The Tribunal concluded, though, that in light of its findings in relation to the gravity and seriousness of Dr Freeman's persistent and calculated dishonesty, coupled with its finding that he does not have any insight into his dishonesty, a period of suspension would not be appropriate. It considered that a period of suspension would not be sufficient to maintain public confidence in the profession and promote and maintain proper professional standards and conduct for members of the profession.

Erasure

23. The Tribunal has therefore determined that it is appropriate and proportionate to erase Dr Freeman's name from the medical register. In reaching its decision, the Tribunal had regard to the SG and, in particular, paragraph 109. This sets out a number of factors, any one of which may indicate erasure is appropriate. The Tribunal decided that those particularly relevant to Dr Freeman's misconduct are:

> *'109 Any of the following factors being present may indicate erasure is appropriate (this list is not exhaustive).*
>
> *a. A particularly serious departure from the principles set out in Good medical practice where the behaviour is fundamentally incompatible with being a doctor.*
>
> *b. A deliberate or reckless disregard for the principles set out in Good medical practice and/or patient safety.*
>
> *…*
>
> *d. Abuse of position/trust (see Good medical practice, paragraph 65: 'You must make sure that your conduct justifies your patients' trust in you and the public's trust in the profession').*
>
> *…*
>
> *h. Dishonesty, especially where persistent and/or covered up (see guidance below at paragraphs 120–128).*
>
> *…*
>
> *j. Persistent lack of insight into the seriousness of their actions or the consequences.'*

24. In considering paragraphs 120-128 of the SG, the Tribunal also considered the following pertinent:

> *124 Although it may not result in direct harm to patients, dishonesty related to matters outside the doctor's clinical responsibility (eg providing false statements or fraudulent claims for monies) is particularly serious. This is because it can undermine the trust the public place in the medical profession. Health authorities should be able to trust the integrity of doctors, and where a doctor undermines that trust there is a risk to public confidence in the profession. Evidence of clinical competence cannot mitigate serious and/or persistent dishonesty.*

125 Examples of dishonesty in professional practice could include:

…

e. failing to take reasonable steps to make sure that statements made in formal documents are accurate.

126 For further detail on a doctor's obligations see Good medical practice paragraphs 19–21 on the duty to keep clear, accurate and legible records, and paragraphs 71–74 regarding writing reports and CVs, giving evidence and signing documents…

128 Dishonesty, if persistent and/or covered up, is likely to result in erasure.'

25. Taking all these matters into account, the Tribunal considered that Dr Freeman's behaviour is fundamentally incompatible with continued registration. The Tribunal has therefore determined that erasure is the only sufficient sanction which would protect patients, maintain public confidence in the profession and send a clear message to Dr Freeman, the profession and the public that his misconduct constituted behaviour unbefitting and incompatible with that of a registered doctor.

26. The Tribunal therefore determined that Dr Freeman's name be erased from the Medical Register.

Determination on Immediate Order - 19/03/2021

1. Having determined to direct that Dr Freeman's name be erased from the Medical Register, the Tribunal has considered, in accordance with Rule 17(2)(o) of the Rules, whether his registration should be subject to an immediate order of suspension.

The Evidence

2. The GMC provided to the Tribunal a Daily Mail article, published on 13 March 2021.

3. The Tribunal also received a number of further testimonials on behalf of Dr Freeman.

Submissions

<u>On behalf of the GMC</u>

4. Mr Jackson provided written and oral submissions on behalf of the GMC. He referred the Tribunal to the relevant paragraphs of the SG.

5. Mr Jackson submitted that an immediate order of suspension should be imposed on Dr Freeman's registration. He referred to the Tribunal's earlier findings, including the finding of serious and persistent dishonesty, and submitted that an immediate order was necessary to maintain public confidence in the medical profession.

6. Whilst Mr Jackson acknowledged Dr Freeman's current working responsibilities as a GP, he stated that Dr Freeman was employed against the background of these proceedings. He reminded the Tribunal that the responsibity of ensuring that arrangements are put in place for the care of Dr Freeman's patients lies with Dr Freeman and his employer. He submitted that there has been adequate time for such arrangements to be put in place.

7. In all the circumstances, Mr Jackson submitted that an immediate order is necessary to protect patients, the reputation of the profession and the wider public interest.

<u>On behalf of Dr Freeman</u>

8. Ms O'Rourke submitted that an immediate order of suspension is not necessary in this case.

9. She stated that, had the country not been in the middle of the Covid-19 pandemic, she would not have made any submissions at this stage.

10. Further, she told the Tribunal that, at no point throughout the course of these proceedings, has the GMC sought to impose an interim order on Dr Freeman's registration.

11. Ms O'Rourke referred the Tribunal to the testimonial bundle. She submitted that Dr Freeman is currently practising as a GP in a deprived area that has been particularly affected by the national Covid-19 pandemic. He has been also acting as a supervising practitioner at a vaccination centre. She told the Tribunal that his GP's practice is under considerable strain. She referred to the many positive comments made about Dr Freeman by his colleagues and stated that no negative ones had been received.

12. Ms O'Rourke submitted that there is no evidence that any patient is at risk. She stated that the public interest has been dealt with by the Tribunal's decision to erase Dr Freeman from the Medical Register. She submitted that there is a greater public interest allowing Dr Freeman to continue his valuable work at the GP surgery and the vaccination centre.

13. She concluded by submitting that it was not necessary to impose an immediate order of suspension in this case.

The Tribunal's Determination

14. In reaching its decision, the Tribunal has exercised its own judgement, and has taken account of the principle of proportionality, balancing Dr Freeman's interest with the public interest.

15. The Tribunal had regard to paragraph 172 of the SG, which states:

> *'172 The tribunal may impose an immediate order if it determines that it is necessary to protect members of the public, or is otherwise in the public interest, or is in the best interests of the doctor.'*

16. The Tribunal was satisfied that an immediate order was not necessary to protect members of the public in this case, nor would it be in the best interests of Dr Freeman. Nevertheless, it had regard to paragraph 173 of the SG, which includes a reference to cases in which immediate action must be taken to protect public confidence in the medical profession.

17. In this case, the Tribunal has determined that Dr Freeman's name be erased from the Medical Register. It has outlined its reasons for that determination, including Dr Freeman's planned, repeated and persistent dishonesty; conduct in relation to which he displayed no real insight. Absenting such insight, the Tribunal could not be confident that such dishonest conduct would not be repeated.

18. Against that background, having already determined that Dr Freeman's behaviour was fundamentally incompatible with being a doctor, the Tribunal considered it would be inconsistent with the basis of its sanction determination to allow him to continue to practise as a doctor.

19. In coming to that decision, the Tribunal considered fully the submissions made on Dr Freeman's behalf, and the testimonials provided in relation to immediate suspension. These described (among other things) the practical difficulties that would result for those with whom he worked, and those he treated; particularly during the current pandemic. However, the Tribunal was mindful of the paragraphs 175 and 176 of the SG:

> *'175 […] the tribunal will need to bear in mind that any doctor whose case is considered by a medical practitioners tribunal will have been aware of the date of the hearing for some time and consequently of the risk of an order being imposed. The doctor will therefore have had time to make*

> *arrangements for the care of patients before the hearing, should the need arise.*
>
> *176 In any event, the GMC also notifies the doctor's employers or, in the case of general practitioners, the relevant body, of the date of the hearing. They have a duty to make sure that appropriate arrangements are in place for the care of the doctor's patients should an immediate order be imposed.'*

20. Given the particular circumstances of this case, the Tribunal has concluded that the public interest - in terms of maintaining public confidence in the medical profession, and in declaring and upholding proper standards for that profession – properly requires an immediate order to be made.

21. The Tribunal has therefore determined to impose an immediate order of suspension on Dr Freeman's registration.

22. This means that Dr Freeman's registration will be suspended from today. The substantive direction of erasure to be imposed on Dr Freeman's registration will take effect 28 days from when notice is deemed to have been served upon him, unless he lodges an appeal in the interim. If Dr Freeman lodges an appeal, the immediate order for suspension will remain in place until such time as the outcome of any appeal is determined.

23. There is no interim order to be revoked.

24. That concludes this case.

Confirmed
Date 19 March 2021 Mr Neil Dalton, Chair

ANNEX A – 07/11/2019

Application for Dr Freeman to be treated as a vulnerable witness and be granted reasonable adjustments

1. This determination will be read in private XXX. As this case concerns Dr Freeman's alleged misconduct, a redacted version of this determination will be made available at the conclusion of the hearing XXX.

2. Ms O'Rourke, QC, on behalf of Dr Freeman, made an application that Dr Freeman be treated as a vulnerable witness and be granted reasonable adjustments during the hearing.

3. She submitted that, when Dr Freeman gives evidence, the days will need to be shorter; in addition to a lunch break, he will require at least one break in the morning and one in the afternoon, and he will be able to give evidence for no more than three hours per day.

4. Ms O'Rourke further submitted that, to give privacy to Dr Freeman, he may require the use of screens to shield him from the public gallery when he gives evidence. Further, should he be in attendance when Mr D gives evidence, screens would be required between Dr Freeman and Mr D.

5. Mr Simon Jackson, QC, on behalf of the GMC, did not oppose the application. He indicated that he was content with the special measures suggested by Ms O'Rourke.

6. The Tribunal had regard to Rule 36 of the General Medical Council (Fitness to Practise Rules) 2004 as amended ('the Rules'), and bore in mind that Ms O'Rourke's application was unopposed by the GMC. It also had regard to those aspects of the report XXX which XXX recommended reasonable adjustments which could be made to help him engage with the Tribunal process.

7. In all the circumstances, the Tribunal determined that it was appropriate to adopt the measures set out in paragraphs 3 and 4 above in order to ensure Dr Freeman's evidence was not otherwise adversely affected.

ANNEX B – 07/11/2019

Application to amend the Allegation

1. On Day 1 of the hearing, Mr Jackson, on behalf of the GMC, made an application under Rule 17(6) of the Rules to amend paragraphs 12 and 13 of the Allegation. Paragraphs 12 and 13 of the Allegation read as follows:

12 Your motive for placing the Order was to obtain Testogel to administer to an athlete to improve their athletic performance.

13 The motive for your actions as outlined at Paragraphs 3 to 11 (inclusive) above was to conceal your motive as outlined at paragraph 12 above.

2. It was proposed by the GMC to amend these paragraphs to read:

12 You placed the Order and obtained the TestoGel:

a. when you knew it was not clinically indicated for the non-athlete member of staff as described at paragraph 9.a above;

b. knowing or believing it was to be administered to an athlete to improve their athletic performance.

13 The motive for your actions as outlined at Paragraphs 3 to 11 (inclusive) above was to conceal your conduct as outlined at paragraph 12 above.

3. Mr Jackson submitted that the proposed amendments would clarify the GMC's case without shifting it.

4. He said that the proposed paragraph 12a reflected the indication by Dr Freeman, through his representative, that the evidence of Dr F was now agreed. This indication was given to the GMC on 29 October 2019 for the first time. Amending the Allegation to insert 12a would, he submitted, simply reflect that reality.

5. In relation to the proposed paragraph 12b, Mr Jackson submitted that it was fundamentally the same as the original paragraph 12. He said the change of wording (from 'your motive …' to 'knowing or believing …') still represented a 'high threshold' for the GMC to meet. This change was intended to reflect Dr Freeman's current position as set out in his recent statement of 24 September 2019. Mr Jackson's concern was that Dr Freeman could say, in terms, that '*Testogel was for a third party, I don't know what was going to happen to it'*.

6. Mr Jackson drew the Tribunal's attention to paragraph 49 of Dr Freeman's statement.

7. In summary, Mr Jackson submitted that it was in the public interest to make the amendments, and there would be no unfairness to Dr Freeman should the proposed amendments be agreed. He added that if, resultantly, Dr Freeman felt it necessary to instruct an expert, the time allocation for this case was sufficient to

enable it to occur. Finally, Mr Jackson submitted that, insofar as Dr Freeman considered the amended Allegation required further commentary from him (on the basis that when he made his statement paragraph 12 of the Allegation was differently worded), Dr Freeman could provide this in his oral evidence to the Tribunal.

8. Ms O'Rourke, on behalf of Dr Freeman, opposed Mr Jackson's application. She submitted that the proposed amendments would fundamentally change the GMC's case.

9. In relation to 12a, she submitted this was inconsistent with how the GMC had put its case at 9a and 10. In other words, in 9a and 10, the GMC alleged that Dr Freeman had been untruthful on 17 February 2017 during an interview with UK Anti-Doping by stating the Testogel had been ordered for a non-athlete member of staff. However, in effect, 12a alleges (in her view) something different: tacitly, that Dr Freeman was being truthful at 9a in that he did order it for that member of staff, albeit he should not have done as it was not clinically indicated for the particular person.

10. In relation to 12b, Ms O'Rourke submitted that, by changing the words from 'your motive …' to 'knowing or believing …', the GMC was trying to relieve itself of the burden of establishing what was in Dr Freeman's mind. She said that, in order for Dr Freeman as a '*jobbing GP*' now to defend himself against the Allegation of what he 'knew or believed', it would be necessary for him to have evidence from an expert in GP practises to describe what a reasonable GP would 'know or believe' in such circumstances. As the proposed amendment had only been sought for the first time on 29 October 2019, Dr Freeman did not currently have recourse to such an expert.

11. In her submission, therefore, taking into account the lateness of the application to amend (a year, she said, after the notice of enquiry had been sent), in circumstances where Dr Freeman had not been given an opportunity to comment in his statement on the proposed amendments, and where he had not instructed an expert in GP practises, it would result in unfairness to Dr Freeman if Mr Jackson's application was granted.

12. For completeness, Ms O'Rourke indicated that she would have been in a position to agree a different set of amendments, being those Mr Jackson had proposed previously:

> *12 Your motive for placing the Order was to obtain Testogel in order for it to be administered to an athlete intending to improve their athletic performance.*

13. Neither party made submissions on the proposed amendment to paragraph 13 of the Allegation.

The Tribunal's Decision

14. The Tribunal reminded itself of the law at Rule 17(6) of the Rules:

> '*(6) Where, at any time, it appears to the Medical Practitioners Tribunal that—*
>
> *(a) the allegation or the facts upon which it is based and of which the practitioner has been notified under rule 15, should be amended; and*
>
> *(b) the amendment can be made without injustice,*
>
> *it may, after hearing the parties, amend the allegation in appropriate terms.*'

15. Having considered the submissions from the parties, the Tribunal's determination was that the application should be granted and that this could be done without injustice.

16. Its reasons are these.

17. Paragraph 12a can be understood to reflect particular conclusions reached by Dr F in an expert report that was agreed by Dr Freeman. As such, its effect would be to particularise in the Allegation an existing aspect of GMC evidence, already known by Dr Freeman, in circumstances where what is being contended in that evidence is no longer, seemingly, in dispute.

18. The Tribunal considered Ms O'Rourke's submission that to add 12a to the Allegation would be inconsistent with the GMC's case at 9a and 10. It was not persuaded that it was. While the Tribunal recognised fully Ms O'Rourke's point, it considered the amendment's effect could go to the plausibility of Dr Freeman's assertion about why, and for whom, he claims to have ordered the Testogel.

19. Turning to paragraph 12b, the Tribunal determined there was also no unfairness in making this amendment.

20. It is based upon GMC evidence already seen by Dr Freeman, and is said to reflect the GMC's more recent, nuanced, understanding of Dr Freeman's position arising from his statement of 24 September 2019. For the reasons Dr Freeman claims therein, he had only been able to articulate his position fully for the first time in that statement ('*I have not been truthful until now*').

21. Insofar as Dr Freeman wrote the statement with 'motive …' not 'knowing or believing …' in his purview, he can, if he wishes, develop his position to reflect the GMC amendments in any oral evidence he gives to the Tribunal.

22. Finally, Ms O'Rourke submitted that this amendment would necessitate Dr Freeman having to call evidence from an expert on GP practises to identify what a 'jobbing GP' would 'know or believe' in such circumstances.

23. Dr Freeman was, in his own words, a consultant in sports and exercise medicine ('*I was one of the first FSEM Fellows and also one of the first to be awarded specialist consultant status in Sport and Exercise Medicine by the GMC'*). At the time of the matters in question, he indicates that he was a member of Team Sky's 'Anti-Doping working group'. In the circumstances, the Tribunal was not persuaded that there was any unfairness to him by the absence of an expert to address what a 'jobbing GP' would 'know or believe' about the Allegation as particularised at 12b (i.e. '*knowing or believing it was to be administered to an athlete to improve their athletic performance'*).

24. Dr Freeman might consider expert evidence would assist his position in a different, albeit related, sense (e.g. by providing evidence that, in his GP role treating non-athletes, a body of GPs might reasonably have acted as he says he did regarding Testogel for that member of staff). However, this was evidence which might have been considered relevant, in terms of supporting his position, even if the Allegation had remained one of 'motive'. In other words, the Tribunal did not consider, on the basis of how Ms O'Rourke framed this part of her submission, that it was the 12b amendment which now necessitated the perceived need for such an expert.

25. The Tribunal noted that neither party commented on the proposed change to paragraph 13. The Tribunal determined that there was no injustice in making the proposed amendment, given the amendments to paragraph 12.

26. Finally, the Tribunal considered that 'TestoGel', as presented, was a typographic error. Subject to any further submissions by the parties, the Tribunal proposed to replace it with 'Testogel'.

ANNEX C – 12/11/2019
Application for matters relating to XXX to be heard in private

1. Mr Jackson, on behalf of the GMC, made an application for matters relating to XXX to be heard in private. He submitted that Dr A had asked for such matters not to be dealt with in public session, and that it would be fair and appropriate to go into private session to deal with these personal matters.

2. Ms O'Rourke, on behalf of Dr Freeman, did not oppose the application.

3. The Tribunal had regard to Rule 41(2) of the Rules, which reads as follows:

> '*(2) The Committee or Medical Practitioners Tribunal may determine that the public shall be excluded from the proceedings or any part of the proceedings, where they consider that the particular circumstances of the case outweigh the public interest in holding the hearing in public.*'

4.It was of the view that the particular circumstances of the case in relation to Dr A's wish for such matters to be heard in private, outweighed the public interest in holding those parts of the hearing in public. The Tribunal therefore determined to grant Mr Jackson's application.

ANNEX D – 12/11/2019
Application for matters relating to Dr Freeman's health to be heard in public

1. Ms O'Rourke, on behalf of Dr Freeman, made an application for matters relating to Dr Freeman's health to be heard in public session. He had, she said, discussed this matter with his doctor before reaching this decision. There was no indication that hearing his health issues in public would adversely affect his health.

2. Mr Jackson, on behalf of the GMC, did not oppose the application.

3. The Tribunal had regard to Rule 41(3) and (6) of the Rules which states:

> '*(3) Subject to paragraphs (4) to (6), the Committee or a Tribunal shall sit in private, where they are considering-*
>
> *…*
>
> *(b) the physical or mental health of the practitioner.*'
>
> '*(6)…the Committee or Tribunal may, where they are considering matters under paragraph (3)(a) or (b), hold a hearing in public where they consider that to do so would be appropriate, having regard to-*
>
> *(a) the interests of the maker of the allegation (if any);*
>
> *(b) the interests of any patient concerned;*
>
> *(c) whether a public hearing would adversely affect the health of the practitioner; and*

(d) all the circumstances, including the public interest.'

4. Having regard to the submissions of the parties, and Dr Freeman's considered decision that he wished to have his health matters heard in public session, the Tribunal determined to grant Ms O'Rourke's application.

ANNEX E – 12/11/2019
Application for matters relating to Mr D's health to be heard in private

1. Mr Jackson, on behalf of the GMC, made an application for Mr D's health matters to be heard in private session.

2. He submitted that, although Mr D was aware of media reports last week which referred to his health, he had requested that any further matters relating to his health be dealt with in private session. He stated that Mr D's right to be anonymised had been deliberately taken away by Ms O'Rourke at the beginning of this hearing when she referred to him by his full name rather than as 'Patient A'. He further submitted that any potential difficulties which arise for Ms O'Rourke during her cross-examination should not override the difficulties and wishes of the witness.

3. Ms O'Rourke, on behalf of Dr Freeman, opposed the application. She relied upon Article 6 of the Convention (as contained in Schedule 1, Human Rights Act 1998) which gives Dr Freeman the right to a fair and public hearing.

4. She submitted that the only health issue she intended to cross-examine Mr D upon related to his alleged erectile dysfunction (a subject in respect of which, she suggested, Mr D would dispute he had that health condition in any event). She said nothing else in relation to Mr D's health would be the subject of cross-examination. As for the alleged erectile dysfunction, the issue was a central part of the questions she wished to ask him and to move 'in and out' of public session would cause her unfair presentational and flow issues.

5. In addition, she submitted that, without a public hearing of this issue, the case could not be fully, accurately and fairly reported.

6. The Tribunal had regard to Rule 41(1) of the Rules, which establishes as a starting point that '*(1) Subject to paragraphs (2) to (6) below, hearings before the Committee and a Medical Practitioners Tribunal shall be held in public.*'

7. The Tribunal noted this was consistent with Article 6(1) of the Convention which confers the right to a fair and public hearing in the determination of civil rights - albeit subject to a power to exclude the press and public from all or parts of the trial '*… in the interests of morals, public order or national security in a democratic*

society, where the interests of juveniles or the protection of the private life of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice '.

8. The Tribunal also had regard to Rule 41(2) of the Rules, however:

> '*(2) The Committee or Medical Practitioners Tribunal may determine that the public shall be excluded from the proceedings or any part of the proceedings, where they consider that the particular circumstances of the case outweigh the public interest in holding the hearing in public.*'

9. Set against that background, the Tribunal considered whether 'the particular circumstances of the case' outweighed the public interest in hearing this part of Mr D's evidence in public.

10. In the Tribunal's assessment, the particular circumstances were in one sense unusual. It recognised that it would ordinarily be common practice in MPTS hearings to anonymise patient names by referring to them in public session as, for example 'Patient A' or 'Patient B'. By this means, the principle is preserved that, insofar as if sensitive information (such as patient data) is raised, the patient's identity would not be known.

11. Here, by the stage the GMCs application was made, anonymity no longer existed for Mr D. Mr Jackson submitted that it had been stripped away from him by Ms O'Rourke. The Tribunal's determination was that, even absenting such a 'stripping away', the usual process undertaken to secure anonymity was in any event always bound here to be more illusionary than real, given Mr D's public profile and the way the particular issues were framed in this case.

12. Moreover, the Tribunal had regard to the fact that, by the stage the GMCs application was made, the said health issue (erectile dysfunction) had already been specifically introduced in public session by Mr Jackson during his case opening. As such, it had been placed in the public domain by the GMC.

13. In view of this, the Tribunal determined as follows:

a Subject to (b) below, the general topic of erectile dysfunction could be the subject of questions to Mr D (and, as appropriate, other witnesses) in public session, as could other aspects of Mr D's evidence;

b However, insofar as questions are asked in relation to Mr D's clinical history (e.g. patient records, prescriptions or confidential conversations with healthcare professionals) then those particular questions should be asked in private session.

ANNEX F – 06/12/2019
Application to admit further evidence

1. On 28 November 2019, Mr Jackson, on behalf of the GMC, made an application, pursuant to Rule 34(1) of the Rules, to admit a redacted transcript of Dr Freeman's recorded interview with Mr E (Sports Editor at the BBC) which took place in July 2018.

2. For the reasons Mr Jackson provided, he contended that it would be both fair and relevant to admit the transcript.

3. He indicated that it could be admitted as evidence of a 'previous inconsistent statement'. In this regard, he submitted that Dr Freeman's statement from 24 September 2019 was something the Tribunal could properly take into account for present purposes, notwithstanding it had not yet formally been entered into evidence. (Mr Jackson, like Ms O'Rourke, was unable to cite any caselaw on that point).

4. Mr Jackson went on to submit that the transcript could be admitted under Rule 34(1) in any event because it was fair and relevant when considered in the context of those paragraphs of the Allegation which remain to be decided.

5. Ms O'Rourke objected to the transcript's admission into evidence. She averred that Dr Freeman's statement of 24 September 2019 is not presently in evidence and, unless and until it is, the transcript cannot amount to a 'previous inconsistent statement'.

6. Moreover, she submitted that, for reasons she explained, the contents of the transcript were not relevant, not least when taking into account Dr Freeman's new statement of 28 November 2019 which explained the specific context in which he had provided his answers to the interviewer.

The Tribunal's Decision

7. The Tribunal had regard to Rule 34(1) of the Rules, which reads as follows:

> '*The Committee or a Tribunal may admit any evidence they consider fair and relevant to the case before them, whether or not such evidence would be admissible in a court of law.*'

8. Reflecting upon this, the Tribunal noted firstly that the accuracy of the document was not in dispute.

9. In considering whether the interview transcript was relevant, the Tribunal determined that it was.

10. Ms O'Rourke had already indicated that Dr Freeman would give evidence in accordance with his statement of 24 September 2019. While that statement is not presently in evidence, the Tribunal considered the GMC was properly entitled to adduce material in anticipation of Dr Freeman's stated position (indeed it had already done so in respect of various material contained in the agreed 'advance hearing bundle'). In this regard, the transcript was relevant to the contents of Dr Freeman's statement of 24 September 2019 in relation to, for example, the theme of bullying and whether Dr Freeman was bullied to give medication by Mr D. The Tribunal noted carefully Dr Freeman's observations in his new statement of 28 November 2019 on the circumstances in which he gave the interview and the context of his answers, but remained of the view that the transcript was relevant.

11. The Tribunal also determined that it would be fair to admit the document under Rule 34(1) of the Rules. The parties agreed that Mr Jackson had brought the document to the attention of Ms O'Rourke at the hearing's commencement, indicating that he would seek to admit it into evidence, and indeed she had informally agreed that it could be admitted into evidence (albeit Ms O'Rourke now indicates that she had not appreciated the stage at which Mr Jackson would seek to do so).

12. The Tribunal also considered that, in the context of fairness, Dr Freeman had been given the opportunity to consider, give context, provide an additional statement in response and give instructions regarding the transcript.

13. In summary, in all the circumstances the Tribunal determined that it would be fair and relevant to admit the document using its powers under Rule 34(1) of the Rules.

ANNEX G – 06/12/2019
Application to exclude Mr D's evidence

1. On 12 November 2019, Mr D attended the hearing and commenced giving evidence at around 14:00. After his examination-in-chief by Mr Jackson, he was then cross-examined by Ms O'Rourke on behalf of Dr Freeman. Later that afternoon, and prior to the conclusion of Ms O'Rourke's cross-examination, Mr D left the hearing, indicating that he would not be returning to complete his evidence. He confirmed in an email to the GMC the following day that his decision remained that he would not return to complete his evidence.

2. On 25 November 2019, the Tribunal received written and oral submissions from both parties in respect of an application from Ms O'Rourke that Mr D's evidence

should be excluded. In her written submission, she said there was '*no justification in all the circumstances to retain his evidence and no good reason for his absence*'.

Ms O'Rourke submissions

3. In summary, Ms O'Rourke submitted that Mr D's oral evidence and two witness statements should be discarded. Should the GMC wish to retain or rely upon it, it would be incumbent upon them to make a case for admissibility or retention, pursuant to Rule 34(1) of the General Medical Council (Fitness to Practise Rules) 2004 as amended ('the Rules').

4. She submitted that, had Mr D not turned up at all to give evidence, the GMC would have had to apply to admit his witness statement under Rule 34(1) of the Rules. She submitted that, based on the case law, any such application would inevitably have failed. As such, she questioned why the GMC should avoid the need to rely on Rule 34(1) when Mr D turned up (briefly) and deliberately (without good reason) walked out so as to deny the defence the right to challenge his credibility, truthfulness, reliability and probity.

5. Ms O'Rourke indicated that Mr D stayed for less than two hours and was cross-examined for approximately one hour and 20 minutes; less than a quarter of his anticipated cross-examination was therefore completed. Ms O'Rourke submitted that, despite her questions being legitimate, Mr D then voluntarily absented himself because he did not like the questions. She noted that he then proceeded to conduct a televised press conference with the media for about ten minutes outside the hearing building, during which he discussed his evidence and questioning.

6. Ms O'Rourke submitted that the situation of Mr D's non-return was wholly caused by the GMC – they failed to issue a witness summons despite early indications that Mr D was not a fully cooperative witness, and then frightened or warned him off in their email asking him to return, which included no encouragement. She submitted that the manner and tone of her cross-examination was not a contributing factor; Mr D made no complaint of it, nor did Mr Jackson during the course of her cross-examination.

7. Ms O'Rourke submitted that, upon leaving, Mr D did not cite illness or incapacity or provide any pressing family or personal reason for not returning the next day. She stated that the fleeing of a witness cannot be excused unless the mode/method of questioning gave rise to bullying and harassment of a 'vulnerable' witness. Mr D did not assert bullying or harassment or anything legally improper, as is suggested by Mr Jackson. Nor was he a 'vulnerable' witness; he thumped the table several times, raised his voice, was obstructive and threatening to her and threatening and intimidating towards Dr Freeman. Ms O'Rourke stated that she had a duty to put Dr Freeman's case (that Mr D is a doper, a liar and a bully) to the witness fearlessly.

8. She went on to submit that Mr Jackson did not at any stage interrupt to allege that she was bullying or harassing, nor did the LQC interrupt to express any concern of inappropriateness of the defence questions or ask for a change in tone, content or timing. Further, Mr D, in his email to the GMC and statements to the press, did not say that he was bullied or harassed.

9. With regard to the legal framework, Ms O'Rourke submitted that the Tribunal should consider Common Law principles/Rules of Natural Justice and Articles 6(1) and 6(3)(d) of the European Convention of Human Rights ('ECHR') in terms of whether it is relevant to the exclusion of evidence rather than admission/retention. She submitted that Rule 34(1) is the only basis for admission/retention and that fairness is required.

10. In terms of Common Law principles/Rules of Natural Justice, Ms O'Rourke submitted that testimony should be given no credence unless the relevant witness appears and the defence is given the opportunity to cross-examine. She stated that cross-examination has been recognised by the Courts as 'the greatest legal engine ever invented for the discovery of the truth'.

11. In terms of Article 6 of the ECHR, she submitted that this is relevant as it guarantees a practitioner the right to a fair hearing, including affording the defence the right to cross-examine the evidence against the individual.

12. Ms O'Rourke drew the Tribunal's attention to what she considered to be the relevant case law, including the cases of *Al-Khawaja and Tahery v UK [2009] ECHR 2766/05* and *R on the application of Bonhoeffer v GMC [2011] EWHC 1585 (Admin)* and the key questions derived from them as follows:

(1) Are there good reasons for the absence of the witness?

(2) Is the evidence of that witness the sole or decisive evidence in respect of the specific contested charge(s)?

(3) Are there any sufficient counterbalancing factors or protections that can overcome the fact that the defence is not in a position to challenge the probity and credibility and truthfulness and reliability of the main witness?

13. Ms O'Rourke submitted that there were no good reasons for Mr D's failure to return and complete his evidence. She submitted that the GMC had a duty to take positive steps to enable the defence to have Mr D cross-examined (she referred to the case of *Trofimov v Russia*) and the GMC is unable to provide a good reason for not ensuring that Mr D stayed.

14. She submitted that paragraphs 12 and 13 of the Allegation, as amended, have in effect made Mr D the 'sole' or 'decisive' witness for the outstanding contested allegations, and indirectly the same for sub-paragraphs 10.a and 10.b relating to 9.a. She further submitted that there are no counterbalancing protections in the circumstances of this case which could possibly save the D 'evidence'; cross-examination never progressed to important questions, and there is nothing that the GMC (or the Tribunal) can suggest to correct or counterbalance Mr D's absence and provide fairness to Dr Freeman in accordance with Rule 34(1) or Article 6 of the ECHR or the common law rules.

15. Ms O'Rourke therefore submitted that it cannot be fair in all the circumstances, given its importance, Mr D's lack of reason for departing, and the absence of any counterbalancing measures, to permit Mr D's evidence to be retained. Accordingly, she invited the Tribunal to exclude his evidence.

Mr Jackson submissions

16. In summary, Mr Jackson, on behalf of the GMC, submitted that Mr D's evidence cannot be 'struck from the record' in whole or in part, and that it would be a difficult task even for an experienced Tribunal to seek mentally to 'excise' all of his evidence, if that were contended. He submitted that Mr D's departure was a direct and foreseeable consequence of the manner and tone of Ms O'Rourke's cross-examination.

17. Mr Jackson submitted that the Tribunal should first consider whether the evidence of Mr D stands as already admitted and then, at a later stage, to consider what weight should be given to that evidence. He submitted that the issue of weight to be given to the evidence can only be determined fairly once all the evidence in the case is complete. He submitted that case law supports this approach.

18. Mr Jackson drew the Tribunal's attention to what he considered to be the relevant case law. This included the case of *R v Stretton and McCallion (1988) 86 Cr App R 7*, which involved a case where two defendants were charged with the attempted rape and false imprisonment of a woman. After an extended cross-examination by the first defendant the complainant had an epileptic fit and collapsed. She was adjudged unfit to continue to give evidence. Despite this, the judge allowed the trial to continue notwithstanding that one defendant's case had not been put to the complainant. Mr Jackson submitted that there is a clear and obvious parallel to this case; Mr D repeatedly stated during cross-examination that he did not request Dr Freeman to prescribe, or obtain the Testogel which was ordered by Dr Freeman. Despite Ms O'Rourke stating that she did not have the chance to put all of her questions to Mr D, she did (in Mr Jackson's submission) have plenty of time to put unsupported and anonymous allegations against Mr D, all of which were denied. Given his repeated denials about ordering the Testogel, Mr Jackson submitted that the Tribunal has had a proper chance to judge Mr D's

credibility, and that opportunity to judge and weigh his evidence will be added to when Dr Freeman gives evidence.

19. Mr Jackson submitted that it is essential for the Tribunal to consider with care the background to Mr D's refusal to continue giving evidence, and the events which led up to it. He submitted that when considering the impact and consequences of Mr D's departure during his evidence, his departure was materially contributed to by the manner and tone of his cross-examination. He noted that even before Mr D's cross-examination, Ms O'Rourke had publicly stated that Mr D was '*a habitual and serial liar, he is a doper with a doping history*'. This statement was made when Ms O'Rourke would have known that there was significant press interest in the case. He submitted that such a statement was inappropriate and had the consequence of putting the witness under significant pressure before he even started to give evidence.

20. Mr Jackson highlighted occasions whereby Ms O'Rourke had made statements about unsubstantiated allegations; made personal 'statements' to Mr D; provided no context to allegations (thereby making it very difficult for Mr D to respond from an informed perspective); and not putting her case to Mr D in respect of the Testogel order when she had plenty of time to do so. Mr Jackson also submitted that Ms O'Rourke's cross-examination was marred by inappropriate, protracted and hostile questioning of the only witness which the Tribunal had been told she wished to cross-examine. The importance of undermining the witness was critical to challenging the GMC's case and appears to be the reason why Ms O'Rourke adopted the 'tactics' which she did when she cross-examined Mr D.

21. Mr Jackson submitted that it is important that the Tribunal take full account of Mr D's stated reasons for leaving and to Mr D's perception of how he was treated before he came to give evidence and whilst giving evidence. Mr D claimed that he was treated unfairly and 'bullied' in his view, which appears to have materially contributed to his leaving. Mr Jackson submitted that it is clear from the transcript of Mr D's evidence and his email to the GMC that Mr D felt that his treatment before and during his questioning by Ms O'Rourke was unfair, and appears to have caused him to stop answering further questions in cross-examination.

22. He submitted that, in all the circumstances, the Tribunal should allow Mr D's statements and oral testimony to remain in evidence. He submitted that it would be unfair to the GMC to exclude his evidence and it would not fairly address the overarching objective as provided by Section 1A of the Medical Act 1983. He submitted that Dr Freeman can have a fair hearing within the context of Article 6 of the ECHR and, in due course, subject to any 'half time submission', the Tribunal will be directed as to how to approach the evidence of Mr D and what weight it may give it, if any.

The Tribunal's Approach

23. In reaching its determination, the Tribunal took into account all the written and oral submissions from the parties. It also took into account the advice provided by the Chair – which was given in public session and upon which the parties were invited to comment.

Legal Advice

24. The Chair advised in the following terms:

> *'On Monday 25 November 2019, the Tribunal heard an application from Ms O'Rourke on behalf of Dr Freeman to exclude the evidence of Mr D.*
>
> *The Tribunal will recall that, on 12 November 2019, Mr D gave evidence to this Tribunal, under affirmation, whereby in his examination-in-chief he adopted as true to the best of his knowledge and belief the contents of his witness statements dated 19 April 2018 and 13 July 2018. He was then cross-examined by Ms O'Rourke until such point as the cross-examination was curtailed as a result of Mr D leaving the hearing. He subsequently indicated that he would not return.*
>
> *At present the evidence he gave on 12 November 2019 remains admitted in accordance with Rule 34(1) of the Rules.*
>
> *The effect of Rule 34(1) is that the Tribunal 'may admit any evidence it considers fair and relevant to the case before it, whether or not such evidence would be admissible in a court of law'*
>
> *Ms O'Rourke now submits that there is 'no justification in all the circumstances to retain his evidence'. Mr Jackson, on behalf of GMC, submits that the evidence should not be excluded.*
>
> *It is that which the Tribunal must now consider.*
>
> *Ms O'Rourke and Mr Jackson each helpfully provided clear and cogent written submissions in relation to this, developed in oral submissions, and supported by caselaw.*
>
> *The Tribunal heard those submissions, and has copies of the written submissions and caselaw to take away and consider.*
>
> *In terms of guidance on the legal framework within which the Tribunal must reach its determination, the first point to make is that at the centre of the Tribunal's consideration of whether Mr D's evidence is retained or excluded is the issue of fairness.*

This is a principle enshrined in common law and the rules of natural justice, and it is articulated clearly in Article 6(1) of the Convention on Human Rights.

Article 6 protects and guarantees the right to a fair trial; Article 6(1) declaring (among other things) that 'in the determination of his civil rights and obligations, or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

Ms O'Rourke relies upon this.

She also drew the Tribunal's attention to Article 6(3) which declares that 'Everyone charged with a criminal offence has a number of the minimum rights', and that these include (at Article 6(3)(d)), the right 'to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'.

In this latter regard, Ms O'Rourke drew the Tribunal's attention to three judgments from Strasbourg, each of which considered whether a defendant's Article 6 right to a fair trial had been breached as a result of not having had the opportunity to cross-examine a witness.

In the first judgment, Luca (2001), the Court noted at paragraphs 43 to 45 that the domestic courts had convicted the applicant solely upon the basis of statements made by an individual before the trial, in circumstances where neither the applicant nor his lawyer had been given an opportunity at any stage of the proceedings to question the author of those statements. In those circumstances, the court was not satisfied that the applicant was given an adequate and proper opportunity to contest the statements on which his conviction was based. The applicant was therefore denied a fair trial. Accordingly, the Court found there had been a violation of Article 6(1) and (3)(d).

The second case, Al-Khawaja & Turkey v UK (2011), a case which (like Luca) arose out of criminal proceedings, was one where witness evidence had been read because (in one instance) the complainant had died before the trial and (in the other) the witness had been in fear of attending the hearing.

The court made it clear at paragraph 118 that, in considering making an assessment of fairness, it would

> *'look at the proceedings as a whole having regard to the rights of the defence but also to the interests of the public and the victims that*

> *crime is properly prosecuted and, where necessary, to the rights of witnesses)'.*

It is also observed, in this context, that 'the admissibility of evidence is a matter for regulation by national law and the national courts and that the Court's only concern is to examine whether the proceedings have been conducted fairly'.

It went on:

> *'Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings'*

The court indicated that two requirements followed from that principle:

> *'Firstly, there must be a good reason for the non-attendance of a witness.*
>
> *Secondly, when a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6 (the so-called "sole or decisive rule").'*

The European court went on to indicate that the first of the two requirements (namely, that there be a good reason for admitting the evidence of an absent witness) was a 'preliminary question which must be examined before any consideration is given as to whether that evidence was sole or decisive'.

It said, 'Even where the evidence of an absent witness has not been sole or decisive, the Court has still found a violation of Article 6 §§ 1 and 3 (d) when no good reason has been shown for the failure to have the witness examined […]**.'** *The reason being that 'as a general rule, witnesses should give evidence during the trial and all reasonable efforts will be made to secure their attendance.'*

As regards the second requirement, the European court concluded that:

> *'where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1. At the same time, where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance in the scales […] and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case.'*

The third case from Strasbourg Ms O'Rourke relied upon in this regard was Schatschaschwili v. Germany (2015). This also was a criminal case - and it was one where two witnesses had refused to attend a hearing, meaning that they could not be cross-examined. These witnesses had relied upon 'medical certificates […] which indicated that they were in an unstable, post-traumatic emotional and psychological state'.

The Strasbourg court was clear that its role was to 'evaluate the overall fairness of the criminal proceedings' and that, in making that assessment, it would look at 'the proceedings as a whole, including the way in which the evidence was obtained, having regard to the rights of the defence but also to the interest of the public and the victims in seeing crime properly prosecuted and, where necessary, to the rights of witnesses'.

It followed the Court's judgment in Al-Khawaja, which concluded that:

> *'the admission as evidence of the statement of a witness who had been absent from the trial and whose pre-trial statement was the sole or decisive evidence against the defendant did not automatically result in a breach of Article 6 § 1. It reasoned that applying the so-called "sole or decisive rule" […] in an inflexible manner would run counter to the traditional way in which the Court approached the right to a fair hearing under Article 6 § 1, namely to examine whether the proceedings as a whole had been fair. However, the admission of such evidence, because of the inherent risks for the fairness of the trial, constituted a very important factor to balance in the scales (ibid., §§ 146-47).*

The court then went on to adopt the principles developed in Al-Khawaja, confirming it was necessary to examine (in what it characterised as 'three

steps') the compatibility of Article 6(1) and (3(d)) of the Convention with proceedings where statements (made by a witness who had not been present and questioned at the trial) were used as evidence.

It thus confirmed the Court must examine:

> *First, whether there was a good reason for the non-attendance of the witness and, consequently, for the admission of the absent witness's untested statements as evidence;*
>
> *Second, whether the evidence of the absent witness was the sole or decisive basis for the defendant's conviction; and*
>
> *Third, whether there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps caused to the defence as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair.*

The Tribunal will recall these were all matters discussed in the context of Mr D, either directly or in terms, in oral and written submissions by the parties.

In the course of this, Ms O'Rourke drew the Tribunal's attention to the case of Trofimov v Russia which addressed the issue of the requirement upon a party to secure a witness's attendance. The Tribunal must have regard to that case. The Tribunal should also note the various issues Ms O'Rourke wished still to cross-examine Mr D upon when he left the hearing.

For his part, Mr Jackson cited a number of cases from the domestic criminal court (including R v Cameron) where the cross-examination of witnesses was never completed. He invited the Tribunal to consider the approach subsequently taken by the appeal courts, and the perceived relevance to the Tribunal of the courts' informing considerations, in the face of witnesses not completing their evidence. In addition, Mr Jackson properly drew the Tribunal's attention to caselaw addressing the importance of fairness in relation to the questioning of a witness.

To be clear, these cases are relevant in the context of aspects of Strasbourg's '3-step approach', but the Tribunal can and should also consider their application more generally when considering the question of fairness.

This Tribunal has a copy of all of these cases, and a note of the parties' submissions, and it must assess the extent to which they assist it in determining the status of Mr D's evidence.

As indicated, all the aforesaid Strasbourg cases related to criminal conduct, and each looked at the question of a fair trial in the context of the protections afforded by Article 6(3) - which expressly relates to the minimum rights of someone charged with a criminal offence.

In terms of how this caselaw might apply to the present disciplinary context, the Tribunal is assisted by the domestic case of Bonhoeffer v GMC (2011).

The case was cited by both Ms O'Rourke and Mr Jackson. The case considered the circumstances in which hearsay evidence may be admitted in disciplinary proceedings.

In the course of its judgement in Bonhoeffer, the High Court undertook a review of authorities, from which it derived the following propositions:

I. *Even in criminal proceedings the right conferred by Article 6(3)(d) to cross-examine is not absolute. It is subject to exceptions referable to the absence of the witness sought to be cross-examined, whether by reason of death, absence abroad or the impracticability of securing his attendance.*

II. *In criminal proceedings there is no "sole or decisive" rule prohibiting in all circumstances the admissibility of hearsay evidence where the evidence sought to be admitted is the sole or decisive evidence relied on against the defendant.*

III. *In proceedings other than criminal proceedings, there is no absolute entitlement to the right to cross-examine pursuant to Article 6(3)(d).*

IV. *However disciplinary proceedings against a professional man or woman, although not classified as criminal, may still bring into play some of the requirements of a fair trial spelt out in Article 6(2) and (3) including in particular the right to cross-examine witnesses whose evidence is relied on against them.*

V. *The issue of what is entailed by the requirement of a fair trial in disciplinary proceedings is one that must be considered in the round having regard to all relevant factors.*

VI. *Relevant factors to which particular weight should be attached in the ordinary course include the seriousness and nature of the allegations, and the gravity of the adverse consequences to the accused party in the event of the allegations being found to be true. The principal driver of the reach of the rights which Article*

6 confers is the gravity of the issue in the case rather than the case's classification as civil or criminal.

VII. *The ultimate question is what protections are required for a fair trial. Broadly speaking, the more serious the allegation or charge, the more astute should the courts be to ensure that the trial process is a fair one.*

VIII. *In disciplinary proceedings which raise serious charges amounting in effect to criminal offences which, if proved, are likely to have grave adverse effects on the career and reputation of the accused party, if reliance is sought to be placed on the evidence of an accuser between whom and the accused party there is an important conflict of evidence as to whether the misconduct alleged took place, there would, if that evidence constituted a critical part of the evidence against the accused party and if there were no problems associated with securing the attendance of the accuser, need to be compelling reasons why the requirement of fairness and the right to a fair hearing did not entitle the accused party to cross-examine the accuser.*

Turning to the case of NMC v Ogbonna (CA) [2010] EWCA Civ 1216, this considered (among other things) a previous judge's decision as to the fairness of the admission of hearsay evidence.

Therein, the court indicated that resolving the issue of 'fairness' will necessarily be 'fact-sensitive'. Therefore, when considering whether a witness's statement should be admitted at all, it was necessary to examine the issue of fairness 'in the context of the particular facts, including the efforts made to secure the attendance of a witness and the particular implications, including the previous ill-feeling between her and the appellant, of her [the witness's] unavailability for cross-examination.'

In addition to Bonhoeffer and Ogbonna, the Tribunal's attention is also drawn to the High Court judgments in 'disciplinary hearing' cases of Thorneycroft v NMC [2014] EWHC 1565 (Admin) - to which Ms O'Rourke alluded, and White v NMC, Turner v NMC (2014), a case to which Mr Jackson referred.

In Thorneycroft, there were difficulties with witness attendance when two witnesses refused to attend. The Case Presenter made an application to have the statements of these witnesses read, and submitted there would be no unfairness to the registrant on the basis that the Panel would 'only give the evidence the weight that it carries after considering that the witness is not prepared to attend and has not been subject to any cross-examination or any questioning by [the Panel]'. Ultimately, having taken advice from the Legal

Assessor and considered the two statements, the Panel decided to allow the evidence of these witnesses to be read.

The decision was appealed. With regard to admitting the statements of absent witnesses, it was held by the High Court that, having considered the cases of Ogbonna and Bonhoeffer, the following principles emerge:

> *1. The admission of the statement of an absent witness should not be regarded as a routine matter and the Fitness to Practise rules require the Panel to consider the issue of fairness before admitting the evidence.*
>
> *2. The fact that the absence of the witness can be reflected in the weight to be attached to their evidence is a factor to weigh in the balance, but will not always be a sufficient answer to the objection to admissibility.*
>
> *3. The existence or otherwise of a good and cogent reason for the non-attendance of the witness is an important factor. However, the absence of a good reason does not automatically result in the exclusion of the evidence.*
>
> *4. Where such evidence is the sole or decisive evidence in relation to the charges, the decision whether to admit requires the Panel to make a careful assessment, weighing up the competing factors. The assessment should involve a consideration of the issues in the case, any other evidence to be called, and the potential consequences of admitting the evidence; and the Panel must be satisfied, having undertaken such an assessment, that either the evidence is demonstrably reliable or else that there is some means of testing its reliability.*

Turning to the case of 'White', this also involved the admission of hearsay evidence in a disciplinary hearing, albeit in circumstances where that hearsay evidence was also anonymous.

Justice Mitting, underlined the following general points:

> *• It is settled law that Article 6(1) ECHR applies to disciplinary proceedings of which the outcome can be the removal […] of a person's right to conduct professional practice*
>
> *• However, Article 6(3) does not apply to disciplinary proceedings - so that there is no express right for a person 'to examine or have examined witnesses against him' as in criminal proceedings.*

Justice Mitting went on to refer to the applicable statutory framework (which for this Tribunal will include the Rules), and the requirement of fairness (as analysed in Bonhoeffer), plus the requirement, on the facts, for the registrant to have the opportunity to test the evidence of a significant complainant (as established Ogbonna).

He continued:

> *'The general approach of the Strasbourg and UK courts to anonymous and hearsay evidence in criminal proceedings can inform the committee's decision on the admission of either category of evidence. As always, the issue is fact-specific. There is no reason of principle why anonymous or hearsay evidence should not be admitted. […] In a criminal case, the court is astute to see if adequate measures are available to balance the unfairness which the admission of the evidence would otherwise cause.'*

In summary then, the core issue here, in deciding whether to exclude Mr D's evidence, is the question of fairness. Central to that issue of fairness is Article 6(1) which entitles Dr Freeman to a fair and public hearing.

In considering that issue, the general approach of the Strasbourg and UK courts to such evidence in criminal proceedings can inform this Tribunal's decision on its admission (or to be accurate, in this case, its retention).

Ultimately, though, the caselaw is clear that what is "fair" will be fact-specific: it will depend on the circumstances of each case, and in particular on the seriousness and gravity of the allegations, and the importance of the evidence to any disputed facts or allegations.

In deciding what is fair in relation to Mr D's evidence, the Tribunal will have regard to the specific facts before it. Those facts should be considered within the context of the law as set out above, the principles they establish, and to the cases which have been supplied.'

Discussion

25. Set against this, the Tribunal began by reminding itself of the evidence provided by Mr D, and the circumstances surrounding his departure during his cross-examination by Ms O'Rourke.

Mr D's evidence

26. In his first statement (19 April 2018), Mr D's evidence addresses the following:

- His work with British Cycling and Team Sky;
- His contact during that period with Dr Freeman;
- His knowledge of Testogel; and
- Dr Freeman's provision of medical care for him.

27. He also exhibits, and comments upon, his medical records covering the period of his employment with British Cycling, and he exhibits his interview with 'UKAD' (20 October 2016).

28. In his second statement (13 July 2018), Mr D:

- Denies the claim (attributed by GMC to Dr Freeman) that the Testogel delivered to the Velodrome in May 2011 was for him;
- Claims he has limited (and only relatively recent) knowledge of Testogel and its uses;
- Denies ever discussing it with Dr Freeman; and
- Claims he could see no reason why he would need it in light of his medical history.

29. In his oral testimony on 12 November 2019, under affirmation, Mr D gave the following evidence:

- In examination-in-chief, he adopted into evidence his statements of 19 April and 13 July 2018.
- During the course of cross-examination:

    1. Mr D asserted more than twelve times, over a period in excess of an hour, that the Testogel was not for him.

        For example:

        '*I can look you in the eye and swear on XXX, I have never ordered any Testogel from Richard, and if Richard wants to take the screen down and look me in the eye and tell me I did then come on.'*

        And later:

        'I would have no problem coming here telling you, Miss O'Rourke, "Yes, it was for me". I am a non-athlete. It is neither here nor there. It is not like any big secret, but as far as I am concerned, if I had ordered it, I have got no problem telling you I ordered it, and you are saying I can't get a hard-on in the Press. My wife wants to come here

and testify that you a bloody liar. As far as I am concerned, I have no problem coming and telling the GMC if it was for me. I have no problem at all. It wasn't for me and I never ordered it. It is as simple as that.'

2. He denied knowledge of the product Testogel and denied knowledge generally of testosterone gels and patches during *'that period'*.

- In addition, he responded during cross-examination to a number of issues relating to his credibility and character. Among other matters, he:

1. Denied reading Dr Freeman's book, and those of Floyd Landis and Lance Armstrong;
2. XXX; and
3. Denied having testosterone vials in his fridge (`*at his house in Rowley Regis, probably back end of the 1990s/ early noughties'* (Ms O'Rourke)) and having been seen to inject the testosterone.

30. Also, during cross-examination, some telephone and email exchanges between Mr D and the GMC were put to him. Mr D accepted these demonstrated a tardy approach to communication on his part – to the extent that, at one point, the Tribunal notes that the GMC raised the issue of securing a witness summons.

<u>The circumstances surrounding Mr D's departure during his cross-examination by Ms O'Rourke</u>

31. On the morning Mr D was due to give evidence, and shortly prior to him being called, Ms O'Rourke asserted in public session to the Tribunal that `*our case about this gentleman and why we say it is not suitable for video link is he is a habitual and serial liar. He is a doper with a doping history*...'. This was immediately reported on the social media application, Twitter.

32. Also, that morning, while the tribunal was in private session, an issue between the parties was raised XXX.

33. Having been sworn, and given his evidence-in-chief, it became evident that Mr D had already been made aware of both matters.

34. Early into Ms O'Rourke's cross-examination, he said `*You have already accused me of being a doper previously in this hearing…you have called me a serial liar…you don't even know me and yet you can make these assumptions and … say these things but I have no defence to it … I just think you are totally out of order … an apology would be nice'*.

35. The following exchange also took place:

> Mr D: *'You* (Ms O'Rourke) *have been told XXX, and where is your documentation? Where is your evidence?'*
>
> Ms O'Rourke: *'We will come to that in due course.'*

36. He likewise asked to be informed of the evidence Ms O'Rourke possessed in relation to other matters she had raised.

- In relation to Mr D's request to see the 'threatening texts', Ms O'Rourke replied, '*We are going to come to texts in a minute*.'
- In relation to the testosterone vials in his fridge and his alleged injecting of testosterone, Mr D asked, '*Can I have the name and the evidence. I want to see the name and the evidence. Everything is meant to be evidence-based here, okay, so can you give me the name and the evidence?'* Ms O'Rourke replied, *The individual in question at the moment wishes to remain anonymous … but he has provided his name and his details'* and, later, '*it is going to be a decision for me in due course as to whether I manage to persuade the individual in question to come forward*.'
- In relation to the assertion that the Testogel was ordered by Dr Freeman on Mr D's instruction (Mr D: '*where is your evidence for that?'*), Ms O'Rourke replied '*we will come to that*'.
- More generally, when he asked for information about people who (Ms O'Rourke alleged) had come forward to call him a liar with a doping history, and to call him a bully, Ms O'Rourke stated that she held statements from '*about five'* witnesses in this regard, and that she said she would give him the names *'in due course'*, and that it was a matter for her how she deployed the information.

37. Mr D:

> '*I am getting quite frustrated … you have brought me over here, you have sat me in a room for two days. The question you want to know is whether I ordered something and I am prepared to … take a lie detector test, whatever you want, to prove that I never ordered this stuff.'*

38. Throughout cross-examination, he referred a number of times to his perception that he and his family were being bullied by Ms O'Rourke's approach, and the impact this was having upon them. For example:

'*She can go around the houses and my 12-year old son can read the crap that you have written in the papers about bullying etc. You are the bully … you are the one bullying my children*.'

And:

'*As far as I am concerned, you are a bully and what you have put my family through*.'

39. In relation to the alleged conduct at Rowley Regis, the exchange between Mr D and Ms O'Rourke included the following:

Mr D: '*I spent two days with UKAD under these type of allegations, yes, and totally exonerated…'*

Ms O'Rourke:'*I don't think that is right.'*

Mr D: '*…of any wrongdoing, anything to do with drugs, and therefore I think it is totally irrelevant that my past be dragged into this hearing through someone who is very vindictive towards me and doesn't even know me, and is trying to discredit me. I have been cleared of that and therefore I don't believe that that should be a line of questioning.*'

Ms O'Rourke: *'If he denies it and says it is not true and it is all made up, then it is going to be a decision for me in due course as to whether I manage to persuade the individual in question to come forward.'*

Mr D: '… *There was no case taken forward because there was no substantial evidence and, as I have said, I have been up in front of UKAD. And can I just ask the Chair and the members: am I the one on trial here?'*

…

Mr D: '*I feel like I am the criminal*.'

…

Ms O'Rourke: '… *I have to test your credibility by saying why we say they* (i.e. Mr D's two witness statements to the GMC) *are lies*.'

Mr D: '*You have made an opinion already on my credibility in what you have said to people and what you have said to the press, which has affected me and my family, which is totally wrong, and I am very, very upset about that*.'

40. And later:

Mr D: '*All I am trying to say to you and the panel is that this whole line of questioning about stuff in my fridge and bullying and bringing my kids into this, Chair, is totally wrong. We are here to answer a simple question and I have no knowledge of that Ms O'Rourke. You have to believe me because …'*

Ms O'Rourke: '*I don't believe you Mr D.'*

41. Later:

Mr D: '*… I have told the truth and I have told you –*'

Ms O'Rourke: '*No, you are not interested in getting caught out in a lie*.'

Mr D: '*In what sort of lie?'*

Ms O'Rourke: '*About the Testogel, a lie about your doping history … a lie about your bully …'*

Mr D: '… *Can I just stop you there? And be very careful in the line you are going down there because I will do you for defamation because you have no evidence and you can't stand there and call me a liar and you can't accuse me being a doper and I want that retracted*.'

Ms O'Rourke:'*I am sorry I am not retracting it.'*

Mr D: '*I want that bloody retracted.'*

Ms O'Rourke:'*I have got evidence. I have got statements. I have got articles.'*

Mr D: '*You might have evidence of a minority of minus individuals* [sic] *that are jealous, but you have no evidence*.'

42. Before leaving the hearing, Mr D said this:

'*I have spent two days down there waiting to come up here. I have come here, I have told the truth. I have answered your questions. I have taken your bullying. My children have taken your gutter press, the gutter tactics that you have put in the Press and everything else. I want to look the panel in the eye and tell you now, I am not lying. I have never lied. She has accused me of all kinds of things here today, cheating and everything else. I am going to leave the hearing now, because this is not life-changing for me. I don't need to be dragged through this shit fight that this individual is trying*

> *to bring up on me personally. I was asked by the GMC to come here and give you an answer. Did I, or did I not, order gels? I did not order gels, okay?'*

43. Shortly after leaving the hearing room, Mr D spoke to the news media. Answering questions, he said he considered he had been singled out and felt *'like I'm on trial'*. He described the process as '*quite upsetting'* and said *'you will be aware there was nothing evidence-based in there and it's quite sad to think … my 12-year old son picks up the paper and sees dad being accused of being a bully when actually … this lady's become the bully*.'

44. In correspondence the following day between Mr D and a lawyer for the GMC, the latter indicates that it is a matter for Mr D whether he decides to return to the hearing.

45. He declined to do so, saying:

> *"I have answered the question you ask of me and assured the panel I didn't request the order. There is no evidence via prescription or text or email to suggest otherwise. My statutory rights were invaded and I'm seeking legal advice on that front as we speak … I don't know law but I felt* [GMC counsel] *should have been much stronger than allow her to accuse me of lies and doping. UKAD cleared me on all counts of these allegations many years ago but nobody stood up for me and objected to this line of questions. Having heard my children say dad your retired now just go home. You made your point so leave it at that. This helped make my decision easier. As you put it, there would be more of the same that has nothing to do with this case. … I want you to appreciate my family come first and having my good name dragged through the mud is not nice for friends and family to have to endure.'*

The Tribunal's analysis and determination

46. Set against this fact-specific background, and bearing in mind all the submissions made and the relevant law, the Tribunal reached the following decision.

47. The evidence of Mr D was admitted on 12 November 2019 in accordance with Rule 34(1) of the Rules. That is its current status.

48. The issue is whether it should now be excluded on the basis that Mr D's cross-examination was not completed.

49. In considering this, the Tribunal looked first at the reason provided by Mr D for not completing his evidence.

50. The Tribunal determined that Mr D's unwillingness to continue to be cross-examined arose directly out of his perception of unfairness and bullying engendered by Ms O'Rourke's approach to him, an approach he perceived to have begun even before he had entered the hearing room.

51. As set out above, he made it plain repeatedly that his character and reputation was being publicly impugned in relation to denied matters in circumstances where, despite asking his accuser – Ms O'Rourke – for the evidential basis for the accusations, he was not being provided with sufficient information to defend himself. This process was, he said, having an impact upon his family.

52. When considered as a whole, the Tribunal found that – taking together Ms O'Rourke's comments before he entered the hearing room, the Tweets publicising those comments, and the unwillingness of Dr Freeman's legal team during more than an hour of cross-examination to provide information underpinning potentially important accusations – there was an objective and understandable basis to warrant Mr D forming the said perception.

53. The Tribunal went on to consider whether Mr D's early departure could instead be viewed as a manifestation of a predisposition, already formed prior to the hearing, that he would not cooperate with the hearing process – as, perhaps, suggested by the contact between him and the GMC in advance of the hearing (and, thereby, a predisposition to which the GMC should have been alert). However, the Tribunal was not persuaded this was the case. While Mr D accepted that he was slow to respond to correspondence, and expressed some measure of anxiety about being involved in the case, this did not appear to the Tribunal to be anything more than would be common among many witnesses in relation to a relatively high-profile hearing.

54. The Tribunal considered whether the GMC had been dilatory in having not obtained a witness summons to secure his continued attendance. The Tribunal was not persuaded of this. Mr D had said he would provide witness statements and he did so. He had said he would attend the hearing, and he did so – flying into Britain from Spain, attending MPTS building for two days, and eventually giving evidence when called for the last half-day of this. Prior to the hearing, Mr D's representations, coupled with his actions, represented a contra-indication to the requirement to obtain a witness summons.

55. For completeness, the Tribunal also considered whether the tone and content of the GMC's letter to Mr D asking him to return contributed to his refusal to do so. It found that it did not. The Tribunal considered, also, whether the GMC should have sought a witness summons to secure Mr D's return after his 12 November departure. However, it noted that those representing Dr Freeman had not sought this. Indeed, in the day (or days) immediately following Mr D's departure, they had indicated that they were not seeking to exclude his evidence, but would instead welcome its

continued inclusion subject to various '*caveats and riders'* (or words to that effect). The application to exclude Mr D's evidence came later.

56. Having considered the circumstances of Mr D's departure, the Tribunal went on to consider the potential relevance and impact of Mr D's testimony in relation to paragraphs 10 (re 9a), 11, 12 and 13 of the Allegation, in the event that was retained in evidence.

57. The Tribunal was aware that most of the matters originally alleged against Dr Freeman have already been admitted and found proved.

58. Among other things, those facts admitted and found proved establish *of themselves* that:

- On 16 May 2011 Dr Freeman ordered for delivery to the Velodrome the drug Testogel;
- This was a drug prohibited under the World Anti-Doping Agency List of Prohibited Substances and Methods;
- When confronted, Dr Freeman lied to two colleagues about having ordered the drug, claiming it had been sent in error;
- He then entreated a third party (Ms C) to write an email relating to the drug, claiming the drug had been sent to him in error, had been returned, and that it would be destroyed – when he knew none of this was true;
- Five months later, Dr Freeman showed the resultant email to his said two colleagues as evidence that the drug had been sent to him in error, had been returned and that it would be destroyed – knowing that none of this was true;
- Then, when interviewed by UK Anti-Doping approximately six years later, on 17 February 2017, Dr Freeman lied again, stating the Testogel had been returned to Fit4Sport when he knew this was untrue.

59. Coupled with the admitted matters, other material introduced into evidence by the GMC is capable of establishing (and the Tribunal puts it no higher than that at present; it has not reached the stage of assessing the evidence) that:

- According to expert witness, Pharmaceutical Toxicologist Professor T OBE, Testogel was a drug which could be, and in the past had been, used to increase the athletic performance of elite professional cyclists.
- At the time Dr Freeman obtained that drug, and lied about having done so, he was team doctor for the elite professional cyclists of *British Cycling* and *Team Sky*.

60. In the absence of any explanation in evidence to the contrary from Dr Freeman, it will therefore be open to the Tribunal – on those facts alone – to consider whether it can draw an inference of his culpability in relation to the remaining paragraphs of the Allegation (none of which refer to Mr D).

61. For the avoidance of doubt, the Tribunal has not and will not begin to consider this question until it retires to reach a determination on facts (or unless the Tribunal is invited to consider an application of 'no case to answer' in relation to the outstanding facts).

62. However, the point is significant at this stage because, when considering Mr D's evidence, the Tribunal's determination is that it cannot presently be assessed to be the 'sole or decisive' evidence in relation to the remaining paragraphs of the Allegation, as framed.

63. The Tribunal noted that Mr D is not a complainant in the sense identified in the cases referred to by the parties. He is not an 'accuser'; he does not allege anything against Dr Freeman.

64. Rather, the impact of Mr D's evidence will be its potential capacity to rebut Dr Freeman's claim (as set out in his statement of 24 September 2019, disclosed in the advance papers, but yet to be formally adopted by him in evidence) that the Testogel was for him (i.e. Mr D).

65. In the event that Dr Freeman gives evidence in line with his said statement (as Ms O'Rourke has indicated to the Tribunal that he will do) then Mr D's evidence gathers potential significance, and can be regarded in the context of other potentially relevant evidence on this theme – from sources such as (for example) the witnesses Dr A and Mr B, and the transcript of the interview with Mr E.

66. Reflecting upon all these matters, the Tribunal went on to consider whether Dr Freeman's right to a fair trial would be denied to him if the evidence of Mr D was not excluded. In doing so, it bore in mind all the caselaw and submissions before it.

67. The Tribunal reminded itself, per *Ogbonna*, that resolving the issue of "fairness" will necessarily be fact-sensitive; and therefore when considering whether Mr D's evidence should be retained at all, it was necessary to examine the issue of fairness *'in the context of the particular facts, including the efforts made to secure the attendance of a witness and the particular implications, including the previous ill-feeling between her and the appellant, of her [the witness's] unavailability for cross-examination.'*

68. It also bore in mind, per *Bonhoeffer,* the indication that the issue of what is entailed by the requirement of a fair trial in disciplinary proceedings is one that must be considered in the round having regard to all 'relevant factors'.

69. It noted that 'relevant factors' to which particular weight should be attached in the ordinary course include the seriousness and nature of the allegations, and the gravity of the adverse consequences to the accused party in the event of the

allegations being found to be true. In this regard, it noted that the allegation Dr Freeman faces is indeed serious.

70. The particular facts here were that Mr D did attend the hearing, gave his evidence-in-chief, and then was cross-examined for more than an hour. Mr D's evidence is not therefore hearsay evidence, unlike the cited Strasbourg cases. During the course of cross-examination, he denied more than a dozen times that the Testogel was for him and asked Ms O'Rourke to produce evidence to the contrary. As the Tribunal has noted, Mr D also denied directly, and while under affirmation, a number of other matters going both to his character and his credibility.

71. Bearing these factors in mind, together with the reason why he left, and importantly the Tribunal's view that Mr D's evidence is not 'sole or decisive' regarding the outstanding matters; the Tribunal has determined that, considering matters 'in the round' (per *Bonhoeffer*), the continued inclusion of Mr D's evidence would not result in Dr Freeman not having a fair hearing.

72. Going forward, the Tribunal considers that – with the doctor's legal representatives having had an opportunity to put aspects of Mr D's alleged past behaviour to him, and having received denials on a number of matters – Dr Freeman now has the opportunity (through Ms O'Rourke) to seek to admit evidence to gainsay Mr D's account, both regarding the Testogel and the character and credibility issues, thereby potentially affecting the weight (if any) that might otherwise attach to that account.

73. While the Tribunal acknowledges that Ms O'Rourke had other areas she wished to cross-examine Mr D upon, and in relation to which she may in due course wish to seek to adduce evidence; those matters already put to Mr D in cross-examination are capable (and, again, the Tribunal puts it no higher than that) of undermining Mr D's evidence, if supported by admissible evidence.

74. In the circumstances, the Tribunal is satisfied that such factors, combined with appropriate legal advice that can and will be given by the Chair in due course before the Tribunal retires to decide on its facts determination, will provide sufficient counterbalance to place the Tribunal in a position to reach a fair and proper assessment of the reliability of Mr D's evidence, and thereby to ensure Dr Freeman's hearing remains fair.

75. Therefore, the Tribunal has determined that Mr D's evidence will not be excluded.

ANNEX G2 – 10/12/2019

Determination on Ms O'Rourke's application to provide the Tribunal with context to the questions she had intended to ask Mr D

1. As part of her submission relating to a 'no case to answer' application, Ms O'Rourke sought permission to elaborate upon the topics she had intended to put to Mr D in cross examination, topics she was prevented from putting to him because of his early departure from the hearing.

2. The Tribunal had already seen a written list of those topics, albeit the topics had not been framed as questions.

3. Ms O'Rourke submitted that without her explanatory commentary, the Tribunal would not now be able to understand the significance of questions she had wished to put, nor how those topics might affect its determination of Mr D's credibility and probity. She said that granting her application, and permitting her to elaborate upon these topics, would amount to a counterbalancing measure in circumstances where she had not been able to question Mr D as fully as she had intended, and where the Tribunal had not excluded his evidence.

4. On behalf of the GMC, Mr Jackson opposed this application. He stated that while there was no objection to Ms O'Rourke identifying the questions she would have asked if Mr D remained to the conclusion of his cross-examination, it was not appropriate for her, in effect, to give evidence through explanatory commentary.

5. He submitted that Rule 34(1) makes clear that the only admissible evidence is that which is fair and relevant. He proposed that the most appropriate route would be for Ms O'Rourke to draft the topics reframed as questions, setting out in writing any relevant background, and for the GMC then to consider and reach an agreement upon this, before placing it before the Tribunal.

6. Ms O'Rourke was not prepared to accede to Mr Jackson's proposal, not least due to time constraints.

Tribunal's decision

7. The Tribunal had regard to the submissions made by Ms O'Rourke and Mr Jackson.

8. Having seen the written list of topics, the Tribunal considered that some of it lacked meaning without further context. In consequence, it determined that when Ms O'Rourke identified the questions, the Tribunal would be assisted by her additional explanation.

9. The Tribunal was able to distinguish evidence from submissions.

10. Accordingly, given the particular circumstances and the background of Mr D's departure, it determined that it would grant Ms O'Rourke's application. It would allow her to identify the remaining questions she would have asked Mr D, and would also allow her to provide sufficient context to make those questions intelligible to the Tribunal.

ANNEX H – 13/12/2019
Rule 17(2)(g) Application

1. Following the closure of the GMC's case by Mr Jackson, Ms O'Rourke, on behalf of Dr Freeman, made a submission of 'no case to answer' under Rule 17(2)(g) of the Rules.

2. Rule 17(2)(g) states that:

> *'The practitioner may make submissions as to whether sufficient evidence has been adduced to find some or all of the facts proved and whether the hearing should proceed no further as a result, and the Medical Practitioners Tribunal shall consider any such submissions and announce its decision as to whether they should be upheld'*

3. Ms O'Rourke made the application in relation to all outstanding paragraphs of the Allegation; namely 10a (in relation to 9a), 10b (in relation to 9a), 11 (in relation to 9a), 12a, 12b and 13.

Ms O'Rourke submissions

4. Ms O'Rourke submitted that there is no case to answer in relation to any of the outstanding paragraphs and sub-paragraphs of the Allegation.

5. Ms O'Rourke reminded the Tribunal that the burden of proof at this stage rests with the GMC.

6. By reference to *Chauhan v General Medical Council [2010] EWHC 2093 (Admin)* and *Strouthos v London Underground Ltd [2004] EWCA Civ 402,* Ms O'Rourke reminded the Tribunal that the language used in each paragraph and sub-paragraph of the allegations must be strictly construed on the basis of the GMC's chosen words.

7. Ms O'Rourke referred the Tribunal to the test for 'no case to answer' laid down in the case of *R v Galbraith [1981] 1 WLR 1039*.

8. Ms O'Rourke also referred to the case of *R v Shippey [1988] Crim LR 767*, and noted that the requirement, per Galbraith, to take the prosecution evidence 'at its highest' did not mean '*picking out all the plums and leaving the duff behind*'.

9. Ms O'Rourke provided detailed oral submissions on the GMC's evidence in relation to her application. These were supplemented by playing the recording of Mr D's oral evidence from 12 November 2019, referring to transcripts of the oral evidence of Dr A and Dr F, and expanding upon those areas which she had intended (but not had the opportunity) to cross-examine Mr D upon – as earlier set out in her written application to exclude his evidence.

10. At its essence, Ms O'Rourke's submission was that:

- The way the GMC had framed 12a in relation to 9a did not enable an evidential link to be made to Mr D;

- Mr D's evidence could not in any event be relied upon, based upon a range of factors to which she referred. These included his demeanour during the hearing; his unwillingness to answer all questions; the fact that, insofar as he answered some questions during cross-examination, he was shown to be a liar; and the numerous other character issues she wished to put to him, and that she set out verbally and in writing for the Tribunal. Taken together, she said his evidence should be viewed as tenuous and unreliable.

- Dr F's analysis had been predicated upon information (including Mr D's first statement, and an incomplete set of medical records) which did not enable him to reach an informed view of whether the Testogel was 'not clinically indicated' (she emphasised that GMC had to prove the negative) for D, or for anyone else.

- She said that, regarding 12b, there was not a 'scintilla of evidence' to establish this to the necessary standard. Indeed, insofar as any attempt might be made to draw an inference of guilt, Ms O'Rourke submitted that one could more persuasively infer (given the guileless way the Testogel was ordered, coupled with some of the evidence from Dr A and Mr B) that it would more likely have been for a non-athlete member of staff.

- She said the GMC had adduced no evidence upon which it could properly be established what Dr Freeman 'knew', or 'knew or believed' at the time he 'placed the Order and obtained the Testogel' in relation to paragraph 12; nor was there evidence to establish the 'motive' attributed to him at paragraph 13; nor was there evidence to establish the dishonesty attributed to him at paragraph 11, in relation to 10a and 10b, as regards 9a.

- More generally, Ms O'Rourke invited the Tribunal – when considering the evidence as a whole and when avoiding the temptation to 'pick out the plums and leaving behind the duff' - to consider carefully the full evidence of Mr B and Dr A, and the extent to which it is capable of supporting an innocent explanation in relation to Dr Freeman.

- In addition, she drew attention to the limited value, for the reasons she explained, of the expert analysis provided by Professor T and Dr F. She said Testogel was a drug with a multiplicity of uses, and could have been as easily obtained from a source that would not have required its delivery to the Velodrome.

11. In summary, Ms O'Rourke's submission was that Mr D's evidence, which she asserted was sole and decisive in relation to 12(a), was tenuous and lacking in credibility to the extent that a Tribunal, properly directed, could not 'convict upon it'. Indeed, she added, if Mr D had stayed to the end of his cross-examination, she would have exposed him as a liar, and the Tribunal would not have considered itself able to rely upon his evidence.

12. In relation to the other matters forming the subject of her application – simply, and for the reasons she explained (and of which the Tribunal took a full note), there was no evidence.

Mr Jackson's submissions

13. Mr Jackson set out, in a 27-page written submission, supplemented by oral submissions, that there was a case to answer in relation to the outstanding matters.

14. Mr Jackson averred that *'Head of Charge 9a, 10, 11 & 13 are directly linked to this primary Head of Charge'* (being Charge 12), and that the GMC case was *'sufficiently particularised to allow the doctor to properly understand its case in respect of the 'identity' of the 'non-rider referred to in Head of Charge 9a'.*

15. Mr Jackson submitted that the foundation of the GMC's case is that Dr Freeman, after initially lying to Mr B and Dr A about the delivery of Testogel to the Velodrome, then lied in his UKAD interview conducted on the 17 February 2017, when he stated he ordered it for a 'non-rider' patient. He reminded the Tribunal that that the GMC has never asserted that the Testogel ordered was to be administered by Dr Freeman personally, but simply that Dr Freeman ordered it knowing or believing that its intended purpose was for it to be administered to an athlete to improve their athletic performance.

16. Mr Jackson submitted, in relation to paragraph 12, that the GMC did not have to prove that the Testogel was not ordered for 'a' non-athlete; only that Dr Freeman

did not order it for 'the' non-athlete alluded to in his UKAD interview, and later identified in correspondence as Mr D.

17. The GMC's case, based on Mr D's evidence, is that the 'non-athlete' referred to in the UKAD interview was not him, and no other 'non-athlete' has been identified or suggested by the defence at any stage.

18. Mr Jackson submitted that in support of the remaining allegations, the GMC relies on all the admitted evidence and, in particular, the admissions made by Dr Freeman in relation to the ordering of a WADA-banned substance and his conduct around it. He referred the Tribunal to the evidence it has heard regarding Dr Freeman's interview by UKAD in February 2017 about his acquisition of the Testogel, including the document 'Third Witness Statement of Dr Richard Freeman', dated 17 February 2017, and (what he characterised as) the post-interview 'cover up' by Dr Freeman. Mr Jackson submitted that the GMC relies on all Dr Freeman's answers to questions about the ordering and intended purpose of the Testogel. In this regard the Tribunal was referred the GMC's 'Chronology of Events' and to the evidence of Mr D.

19. Mr Jackson then made a number of points to support his contention that Mr D was, in respect of important and relevant matters, a 'credible witness'.

20. Mr Jackson reminded the Tribunal of expert evidence adduced on behalf of the GMC. Firstly, from Dr F, Consultant physician and endocrinologist, who having reviewed the medical records (the available medical history of Mr D) and the 'draft' first statement from Mr D, confirmed that there was no clinical justification for treating Mr D with Testogel. Secondly, from Professor T, pharmaceutical toxicologist, who addressed (among other things) the uses to which Testogel could be put, including its use to increase the athletic performance of elite professional cyclists.

21. Mr Jackson submitted that the GMC rely on the fact that Dr Freeman, from his previous experience as the lead doctor in the erectile dysfunction clinic of his GP practice, would have known that a prescription of Testogel was not clinically indicated for Mr D. Dr Freeman has not recorded in Mr D's medical notes any examination or review of any condition which might have warranted such treatment, nor has he recorded any possible 'placebo' prescribing in the hope of providing some benefit to him. Mr Jackson submitted that, in the event Mr D had presented with a medical condition for which Testogel was clinically indicated, then when the Testogel was delivered to the Velodrome, Dr Freeman's instinctive reaction would have been for to tell Dr A and Mr B the order was intended for a 'non-rider' patient on clinical grounds, but to decline to identify who it was for on grounds of 'patient confidentiality'.

22. Mr Jackson submitted that at every stage, from 2011 up to the present time, Dr Freeman has lied, given misleading, evasive and ultimately dishonest answers

about his reasons for ordering the Testogel. He submitted that the GMC relies on Dr Freeman's admitted dishonesty, as set out in Head of Charge 11, in relation to Heads of Charge 3, 5, 7 and 9b. Mr Jackson submitted that the Tribunal could properly draw an adverse inference against Dr Freeman, in respect of his lies about returning the Testogel, when considering whether it could conclude that his motive was as alleged in paragraph 13. However, he cautioned that the Tribunal should only draw such adverse inferences if it thought it was fair to do so.

23. Mr Jackson submitted that the GMC observes that if there was a legitimate intended clinical use of the Testogel in relation to Mr D, as Dr Freeman suggested in his UKAD interview, then it is difficult to envisage why Dr Freeman would have told lies to two colleagues who would have no reason to question the truth of what they were told by Dr Freeman, i.e. that the Testogel was for the treatment of a non-rider's clinical condition.

24. Mr Jackson submitted that, at this stage of this hearing, this Tribunal should properly conclude that it would be open to it, drawing all reasonable and permissible inferences from the admitted evidence (so taking the GMC's case at its highest) that Dr Freeman placed the order and obtained the Testogel per paragraph 12 of the Allegation.

25. Mr Jackson submitted that there is no evidence presently before this Tribunal which undermines such an approach; only conjecture and speculation on the part of Ms O'Rourke.

26. Mr Jackson then referred the Tribunal to the relevant caselaw and reminded it that, at this stage of the hearing process, the Tribunal is considering only whether 'there is a case to answer', applying the principles set out in the caselaw.

27. Mr Jackson concluded that '*taking its evidence at its highest, and drawing all the fair and reasonable (adverse) inferences* […] *the Tribunal, properly directed, could, (and should,) conclude that all the charges are made out; and in undertaking this task, the Tribunal should pay a particular regard to the required standard of proof* […].'

28. In all the circumstances, Mr Jackson submitted the Tribunal should dismiss the defence application, and allow the GMC's case to proceed. Then, at the close of the evidence, he said the Tribunal can hear further submissions as to how the Tribunal should approach the issue of the weight to be accorded to the evidence admitted by each party.

The Tribunal's Approach

29. In reaching its determination, the Tribunal took into account all the written and oral submissions from the parties, together with the caselaw provided, the transcripts of evidence, and the audio recording of Mr D's evidence.

30. The Tribunal also took into account the advice provided by the Legally Qualified Chair – which was provided in public session and upon which the parties were invited to comment. The Tribunal accepted fully that advice.

31. The advice was this:

> *'R17(2)(g) application – no case to answer*
>
> *The Tribunal must now retire to consider an application by Ms O'Rourke under R17(2)(G) of the FTP Rules in respect of 10(a) and 10(b) in relation to (9a); (11) in respect of (9a); and paras (12) and (13) of the Allegation.*
>
> *R17(2)(g) of the FTP Rules 2004, provides that:*
>
> > *'The practitioner may make submissions as to whether sufficient evidence has been adduced to find some or all of the facts proved and whether the hearing should proceed no further as a result, and the Medical Practitioners Tribunal shall consider any such submissions and announce its decision as to whether they should be upheld […]'*
>
> *As Mrs Justice Carr said, in the case of Sharaf v GMC [2013] EWCA 3332 (Admin),*
>
> > *'Rule 17(2)(g) provides an important safeguard. It is oppressive and unjust for an accused person in regulatory proceedings to be required to meet a case that has not been established on sufficient evidence.'*
>
> *It is common ground that the relevant test when considering a 'no case to answer' application is the one laid down in R v Galbraith [1981] 1 WLR 1039.*
>
> *The Tribunal should address the issue on that basis.*
>
> *In Galbraith, Lord Lane CJ, outlined the approach to be adopted in determining such a submission.*
>
> *He said:*
>
> > *"(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.*

(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence

(a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.

(b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. [...]"

Although Galbraith was a criminal case, the cross-application of its principles has been found to apply in the regulatory setting. For example, in R (Dr Alan Tutin) v General Medical Council [2011] EWHC 553 (Admin), to which both Ms O'Rourke and Mr Jackson have referred.

The standard of proof in our context is the civil, not the criminal, standard of proof - in accordance with Rule 34(12) of the Rules.

The burden of proof is on the GMC.

In relation to the Tribunal's appropriate approach to the paragraphs and sub-paragraphs of the Allegation under consideration, Ms O'Rourke has drawn the Tribunal's attention to the cases of Chauhan v General Medical Council [2010] EWHC 2093 (Admin) and Strouthos v London Underground Ltd [2004] EWCA Civ 402 . The Tribunal will have regard to these in relation to the issue of strict construction.

Pill LJ had observed in Strouthos that "it is a basic proposition, whether in criminal or disciplinary proceedings, that the charge against the defendant or the employee facing dismissal should be precisely framed and that the evidence should be confined to the particulars in the charge".

Ms O'Rourke also relied upon the case of R v Shippey [1988] CLR 767.

Therein, Turner J held that the requirement to take the Crown's evidence 'at its highest' (being the phrase used in Galbraith) did not mean "picking out all the plums and leaving the duff behind".

Reflecting upon Shippey, Lord Philips has more recently indicated in R v Salisbury [2005] EWCA Crim 3107, that '…this much- cited case has been put in its context by this Court in the recent decision of Pryer [2004] EWCA (Crim) 1163 in which Hooper LJ deprecated what he called resort to the "plums and duff principle". He pointed out that Shippey itself was a case which depended almost entirely on the evidence of a single complainant whose evidence suffered from internal contradictions and inconsistencies. He treated it as "no more than another case on the facts" and not a case which laid down any principle of law.'

Submissions have been made by the parties in relation to the issue of inferences.

On the issue of what inferences can properly and fairly be drawn, the Tribunal's attention is drawn to the case of Kwan Ping Bong and Kong Ching v The Queen PC [1978] UKPC 28, [1979] 2 WLR 433, [1979] AC 609 which determined that, in reaching its conclusions, it was open to the court to draw inferences from primary facts which it finds established by evidence.

Therein, Lord Diplock went on to say:

> *'The requirement of proof […] does not prevent a jury from inferring, from the facts that have been the subject of direct evidence before them, the existence of some further fact, such as the knowledge or intent of the accused, which constitutes an essential element of the offence; but the inference must be compelling — one (and the only one) that no reasonable man could fail to draw from the direct facts proved.'*

This has last point has since been considered more recently, however, in a case to which Mr Jackson has referred; namely, R v Jabber [2006] EWCA Crim 2964.

Therein, Moses LJ said:

> *'Read literally, Lord Diplock's dicta (in Kwan Ping Bong) might be understood to be saying that an inference was only to be regarded as compelling if all juries, assumed to be composed of those who are reasonable, would be bound to draw such an inference. In short, an inference could only be drawn if no one would dissent from it.*
>
> *'We reject that as an approach to be taken by the judge at the close of the prosecution case, even where the evidence is only circumstantial. The correct approach is to ask whether a reasonable jury, properly directed, would be entitled to draw an adverse inference. To draw an adverse inference from a combination of factual circumstances necessarily does involve the rejection of all realistic possibilities consistent with innocence. But that is not the same as saying that anyone considering those circumstances would be bound to reach the*

> *same conclusion. That is not an appropriate test for a judge to apply on the submission of no case. The correct test is the conventional test of what a reasonable jury would be entitled to conclude.'*

Approving those words, in R v Goring (2011), Lord justice Leveson said,

> *'We would add only this. It has long been a principle that, absent good reason* […] *the prosecution is obliged to call all witnesses who give direct evidence of the primary facts and which the prosecution, when serving statements, consider to be material, even if there are inconsistencies between one witness and another* […]. *Further, although taking the Prosecution at its highest does not mean 'picking out all the plums and leaving the duff behind' (per Shippey), it is necessary to make an assessment of the evidence as a whole and not simply consider the credibility of individual witnesses or evidential inconsistencies between witnesses. It is for the jury to decide what evidence to accept and what evidence to reject and the fact that a witness called by the crown gives evidence in some respects inconsistent with the inferential case being advanced by the crown cannot, by itself, be determinative of a submission of no case to answer; it is obviously, however, a factor to be taken into account.'*

Ms O'Rourke cited the case of Soni v GMC [2015] EWHC 364 (Admin).

In that case, the court explored the remit of the Panel (i.e. the Tribunal) to draw inferences from the evidence it heard. Finding that the panel in that case had been wrong to reject the submission of no case to answer, and wrong (subsequently) to find that dishonesty was proved, Mr Justice Holroyde stated (§61) that,

> *'The crucial question […] is whether on a fair view of the evidence as a whole it was open to the Panel to infer that Mr Soni had* [done what was alleged] *and was deliberately dishonest.*
>
> *'In my judgment, it was not.*
>
> *'Although this was not a criminal charge against Mr Soni, and the GMC only needed to prove its allegation on the balance of probabilities and not to the higher criminal standard, the principle must nonetheless apply that before an inference could properly be drawn, the Panel had to be able to safely exclude, as less than probable, other possible explanations for Mr Soni's conduct.'*

And (§68):

> *'With all respect to the Panel, I am afraid it must have confused grounds for suspicion with evidence sufficient to prove, on the balance of probabilities, a serious allegation against a professional man.'*

Subsequently, in a case relied upon by Mr Jackson, namely AB v CPS (2017) EWHC 2963 (Admin), that court also considered the application of Galbraith in cases where the prosecution relied on circumstantial evidence.

In doing so, it cited approvingly a passage from an earlier case (R v G & F (2012) EWCA Crim 1756). At the relevant passage, Aikens LJ said this:

'We think the legal position can be summarised as follows:

(1) In all cases where a judge is asked to consider a submission of no case to answer, the judge should apply the 'classic' or 'traditional' test set out by Lord Lane CJ in Galbraith.
(2) Where a key issue in the submission of no case is whether there is sufficient evidence on which a reasonable jury could be entitled to draw an adverse inference against the defendant from a combination of factual circumstances based upon evidence adduced by the prosecution, the exercise of deciding that there is a case to answer does involve the rejection of all realistic possibilities consistent with innocence.
*(3) However, most importantly, the question is whether **a** reasonable jury, not **all** reasonable juries, could, on one possible view of the evidence, be entitled to reach that adverse inference. If a judge concludes that **a** reasonable jury could be entitled to do so (properly directed) on the evidence, putting the prosecution case at its highest, then the case must continue; if not, it must be withdrawn from the jury'.*

Finally, Mr Jackson draws the Tribunal's attention to a High Court case from July of this year – namely, Husband v General Dental Council (2019) EWHC 2210 (Admin). This confirms again that Galbraith remains the authoritative statement of principle. Justice Nicol emphasises that 'it is incumbent on the decision maker [i.e. the Tribunal, for present purposes] *to consider the evidence which has been produced at the stage of the 'no case to answer' submission to consider that evidence as a whole. Yet in doing so the task is to decide whether the charge **could**, not whether it **would**, be made out. […] A case should only be stopped if, on the evidence then before the decision maker, the allegation could not be made out taking 'the prosecution case' at its highest.'*

In summary, therefore - bearing in mind R17(2)(g), and the caselaw to which I have referred, together the submissions from the parties and the caselaw each has provided in support - my advice is that this Tribunal should start by

considering the wording of each of the paragraphs and sub-paragraphs of the Allegation which are the subject of the present application.

Then, in considering each of those paragraphs and sub-paragraphs separately, we should consider what evidence there is in each regard and - in doing so - ensure we make an assessment of the evidence as a whole.

Applying the Galbraith test,

If there is no evidence, that is an end of the matter.

If there is some evidence but it is of a tenuous character because of inherent weakness or vagueness, then, looking at the evidence as a whole, if the tribunal considers that it is so tenuous that it becomes unsatisfactory and unsafe to prove that paragraph or sub-paragraph of the Allegation, the Tribunal should not go any further and it should accept the submission of Ms O'Rourke in its particular regard.

The Tribunal will make its determination on this issue together. All members of the Tribunal have an equal vote. The Legally Qualified Chair's vote has the same weight as that of his colleagues.'

32. The Tribunal, having taken the advice of the Legally Qualified Chair, was careful to distinguish between its approach to the evidence at this stage and its approach at the end of the fact-finding stage. At this stage, the Tribunal had to decide whether sufficient evidence had been adduced to satisfy to the necessary standard the Galbraith test in relation to those outstanding paragraphs and sub-paragraphs which form the subject of the present application. It was not presently its function to determine whether those facts in the Allegation were proved. Rather, it would be at the end of the fact-finding stage (should matters get that far) that the Tribunal would have to decide, in light of all the evidence before it, whether the disputed paragraphs and sub-paragraphs had in fact been proved.

33. In undertaking this task, the Tribunal was mindful of all the evidence before it. For the avoidance of doubt, at all times in its current deliberations it remained vigilant to assess whether, in relation to Mr D (who failed to complete his cross-examination and in respect of whom detailed submissions were made from both parties), his evidence could currently be assessed as sufficiently reliable and satisfactory in relation to one or more of the outstanding paragraphs or sub-paragraphs, such that a Tribunal could safely, at the fact-finding stage, find such facts proved.

34. Finally, in recognising its duty to give reasons for its determination, the Tribunal adopted the approach recommended by the Legal Assessor in *Sharaf*. The Legal Assessor's advice was,

> *'[…] if you allow this submission, you should give detailed reasons for doing so. If, however, you dismiss the application and the case proceeds, it is generally considered better to say as little as possible in case, in giving detailed reasons, you give some indication as to the way in which you are considering the evidence at this stage and it would be improper for you to do so. That is my advice."*

35. This approach accorded with the one recommended by Mr Justice Nicol in *Husband v GDC* (§18 ''*There is of course a general duty to give reasons for decisions* […] *That applies with full force if the* [decision maker] *accedes to the 'no case to answer' submission. If it rejects the submission, the duty to give reasons is more attenuated.)*

36. Indeed, the Tribunal noted that, reflecting upon the judgment in *Sharaf*, Mr Justice Nicol stated, *'It is implicit from §73 of her judgment that Carr J endorsed the legal assessor's advice. I respectfully agree with her endorsement of that advice'.*

The Tribunal's analysis and determination

37. Having taken the approach to this application advised by the Legally Qualified Chair, the Tribunal has determined that there is sufficient evidence to establish a case to answer in relation to the outstanding paragraphs and sub-paragraphs of the application.

38. In reaching this view, the Tribunal determined that, based upon the agreed material in the GMC case papers, there is documentary evidence sufficient to establish that the non-athlete member of staff to whom Dr Freeman was alluding to in his interview with UK Anti-Doping on 17 February 2017 (referred to in sub-paragraph 9a) is Mr D.

39. It considered that Mr D's evidence (who said the Testogel was not for him), combined with his medical notes as seen and analysed by Dr F, is capable of establishing for the purposes of sub-paragraph 12a that the Testogel was not clinically indicated for Mr D as 'the' non-athlete member of staff in sub-paragraph 9a.

40. In terms of whether, per 12b, the Testogel was to be administered to an athlete to improve their athletic performance; according to expert witness, Pharmaceutical Toxicologist Professor T OBE, this was indeed a drug which could be, and in the past had been, used to increase the athlete performance of elite professional cyclists. Moreover, there is evidence capable of establishing that, at the time Dr Freeman placed the order and obtained the drug, he was doctor to a team of elite professional cyclists; namely, *British Cycling* and *Team Sky*.

41. In tandem with the above, the Tribunal bore in mind the following matters, already admitted and found proved:

- On 16 May 2011, it had been Dr Freeman who had ordered the Testogel for delivery to the Velodrome;
- This was a drug prohibited under the World Anti-Doping Agency List or Prohibited Substances and Methods;
- When confronted, Dr Freeman immediately lied to two colleagues (Dr A and Mr B) about having ordered the drug, claiming it had been sent in error;
- He then, five months later, entreated a third party (Ms C) to write an email relating to the drug, claiming it had been sent to him in error, had been returned, and that it would be destroyed – when he knew none of this was true;
- Dr Freeman showed the resultant email to his said two colleagues as evidence that the drug had been sent to him in error, had been returned and that it would be destroyed – again, knowing that none of this was true;
- Then, when interviewed by UK Anti-Doping approximately six years later, on 17 February 2017, Dr Freeman lied a further time, stating the Testogel had been returned to Fit4Sport - again, knowing this was untrue.

42. Set against this pattern of admitted dishonesty in relation to the testogel, the Tribunal reminded itself of the words of Lord Diplock in *Kwan,* relevant to the outstanding paragraphs and sub-paragraphs*: 'The requirement of proof […] does not prevent a jury from inferring, from the facts that have been the subject of direct evidence before them, the existence of some further fact, such as the knowledge or intent of the accused…)*.

43. It also reminded itself of the words of Moses LJ in Jabber: '*The correct approach is to ask whether a reasonable jury, properly directed, would be entitled to draw an adverse inference. To draw an adverse inference from a combination of factual circumstances necessarily does involve the rejection of all realistic possibilities consistent with innocence. But that is not the same as saying that anyone considering those circumstances would be bound to reach the same conclusion. That is not an appropriate test for a judge to apply on the submission of no case. The correct test is the conventional test of what a reasonable jury would be entitled to conclude.'.*

44. In the Tribunal's determination, it light of those matters set out above, a reasonable jury could, on one possible view of the evidence, be entitled to draw the following adverse inferences: that Dr Freeman knew the Testogel was not clinically indicated per 12(a); that he knew or believed it was to be administered per 12(b); that his motive was per 13; and that indeed his statement at 9a was dishonest per 11 in that it was untrue and he knew it to be untrue, per 10(a) and 10(b).

45. In reaching this determination, the Tribunal recognised it would require a reasonable jury to reject of all realistic possibilities consistent with innocence.

46. Given that this Tribunal has concluded that a reasonable jury could be entitled to do so (properly directed) on the evidence, putting the prosecution case at its highest, then the case must continue, and Ms O'Rourke's application is rejected.

47. Therefore:

Paragraph 10a in relation to paragraph 9a: Rule 17(2)(g) application rejected

Paragraph 10b in relation to paragraph 9a: Rule 17(2)(g) application rejected

Paragraph 11 in relation to paragraph 9a: Rule 17(2)(g) application rejected

Paragraph 12a: Rule 17(2)(g) application rejected

Paragraph 12b: Rule 17(2)(g) application rejected

Paragraph 13: Rule 17(2)(g) application rejected

ANNEX I – 17/12/2019
Adjournment and Tribunal Directions

1. Ms O'Rourke applied for an adjournment on the basis that Dr Freeman's health had declined over the past seven days and he is not currently fit to participate in the hearing. In support of her application, Ms O'Rourke relied upon a report (14 December 2019) from Associate Professor and Consultant Liaison Psychiatrist, Dr W. Dr W confirmed that Dr Freeman 'is not currently fit to give evidence at the MPTS', adding that he 'is likely not to be fit for several weeks at the very least'.

2. Following further inquiry by the Tribunal, Ms O'Rourke provided updated information from Dr W wherein he confirmed he would be conducting a full review of Dr Freeman but that, in order for it to have clinical value, it could not be undertaken until the middle of January 2020.

3. On the basis of Dr W's expert independent evidence, the Tribunal determined that the hearing would need to be adjourned.

4. This hearing was scheduled to conclude Friday 20 December 2019. It is clear that there is insufficient time remaining to conclude matters in the remaining days of the hearing.

5. This hearing will now adjourn part-heard, subject to Rule 29(2) of the General Medical Council (Fitness to Practise Rules) 2004 as amended ('the Rules').

Tribunal Directions

6. Having regard to its powers under Rule 16(1), 16(1)(a) and 16(6) of the Rules, the Tribunal makes the following directions:

a) Dr Freeman's representatives to write to the GMC by 23 December 2019 setting out those issues upon which they seek further disclosure from, and/or seek further enquiries to be undertaken by, the GMC. The correspondence should identify the specific basis for the requests and, where appropriate, they should be supplemented by sufficient supporting documentation to enable the GMC to make an informed decision upon each issue.

b) The GMC to respond in writing to Dr Freeman's representatives in relation to a) by 15 January 2020 setting out a timebound plan for the material it will supply and the actions it will undertake. Insofar as it declines to act upon one or more of the requests sought by Dr Freeman's representatives, the GMC is directed to provide them with reasons in writing.

c) Subject to those aspects which attract legal privilege, Dr Freeman's representatives to disclose to the GMC by 23 December 2019 the medical notes from Dr W and Dr Y arising out of their clinical assessments of Dr Freeman during December 2019, together with a note of the verbal instructions given by telephone to Dr W for the purpose of preparing his report of 14 December 2019.

d) The Tribunal notes the agreement of Dr Freeman's representatives on 16 December 2019 that Dr Freeman will be medically examined by an independent expert for the GMC. Arrangements will be made directly between the parties, but the Tribunal directs that the examination by the GMC expert should be permitted to occur within two weeks of Dr W's review. The GMC is directed to disclose the resulting medical report to Dr Freeman's representatives within two weeks of its receipt.

e) Dr Freeman's representatives to disclose to the GMC by 15 March 2020 the following:

    - A further signed witness statement from Dr Freeman relating to an any additional evidence upon which he wishes to rely. Insofar as there remain issues outstanding at the time of its disclosure by 15 March 2020 (for example, if Dr Freeman still awaits the outcome of other enquiries), the Tribunal directs that an additional further witness

statement from Dr Freeman should be disclosed as soon as possible thereafter addressing those outstanding matters;
- A signed witness statement from each factual witness upon whose evidence they wish to rely;
- All reports and the CV of any expert(s) upon whose evidence they intend to rely;
- Any document relating to the allegation upon which they wish to rely.

f) Dr Freeman's representatives to serve upon the GMC a written skeleton argument by 15 March 2020 setting out the basis of any application to admit evidence under Rule 34(1) and the basis for any special measures application.

g) The GMC to serve upon Dr Freeman's representatives a written skeleton argument by 21 March 2020 in response to point f).

h) The skeleton arguments at points f) and g), together with any evidence arising out of the directions above, to be supplied to the MPTS in order that they are available for the Tribunal by 27 April 2020.

7. The Tribunal orders that a full transcript of the hearing to date is produced and made available by 27 April 2020.

Dates To Reconvene

8. The Tribunal has determined that approximately 6 weeks is required to conclude the hearing.

9. The hearing will continue in two separate sittings. It is anticipated that the fact- finding stage will be concluded at the end of the first sitting.

10. The dates identified and agreed by all parties are as follows:

Tuesday 28 April until Friday 29 May 2020 (excluding the 2 bank holidays on 8 and 25 May 2020)
The Tribunal has agreed to have a Non-sitting day on either 12 or 13 May 2020 – to accommodate Ms O'Rourke who has a prior commitment.

Monday 5 to Friday 16 October 2020 – to conclude the remaining stages of the hearing.

Annex J – 03/09/2020
DETERMINATION ON LEGAL MATTERS (TRIBUNAL DIRECTIONS)

Record of Determinations – Medical Practitioners Tribunal

1. This determination contains references to Dr Freeman's health and would ordinarily be handed down in private. However, given the Tribunal's earlier determination in relation to Dr Freeman's health matters being heard in public, and having heard clarification from Ms O'Rourke today, this determination will be read in public.

2. Due to the ongoing COVID-19 pandemic, today's hearing is taking place virtually via Skype for Business.

Background

3. Dr Freeman's Medical Practitioners Tribunal ('MPT') hearing began on 29 October 2019. That hearing adjourned part-heard on 17 December 2019, and was due to reconvene in April, May, and October 2020.

4. In March 2020 the MPTS adjourned all new hearings in response to the COVID-19 pandemic. As a result, Dr Freeman's hearing did not reconvene in April and May 2020 as planned.

5. Prior to adjourning on 17 December 2019, the MPT made a number of directions to be complied with prior to Dr Freeman's hearing reconvening. On 13 August 2020 Mr Simon Jackson QC, Counsel, on behalf of the GMC, applied for a number of further directions to be imposed on parties for case management purposes.

6. Today's hearing has therefore convened for one day to consider the imposition of these further directions. Once the arguments have been heard and decided, Dr Freeman's MPT hearing will reconvene on 5 October 2020 (in camera) and on 6 October 2020 (in public session) to continue consideration of Facts, as previously scheduled.

Today's Hearing

7. The Tribunal received skeleton arguments from Mr Simon Jackson QC, Counsel, on behalf of the GMC, and from Ms Mary O'Rourke QC, Counsel, on behalf of Dr Freeman. The Tribunal noted that the majority of the directions were agreed between parties, and it was assisted by oral submissions and a discussion between parties as to the outstanding issues.

Tribunal Directions

8. Having regard to the above, as well as to its powers under Rule 16(1), 16(1)(a) and 16(6) of the Rules, the Tribunal makes the following additional directions:

a. Dr Freeman's representatives to disclose to the GMC details of any medical examinations carried out by Dr Y, and any medical notes or letters relating to such examination no later than 11 September 2020;

b. Dr Freeman's representatives to disclose to the GMC details of any updated independent medical examination by Dr W (or similar), carried out on behalf of Dr Freeman's representatives, and any subsequent report to be disclosed no later than 11 September 2020;

c. Dr Freeman be made available to undergo a medical examination by an independent expert appointed by the GMC in the week commencing 14 September 2020*;*

d. A report to be produced by the GMC-appointed expert and disclosed to Dr Freeman's representatives no later than 25 September 2020;

e. By no later than 2 October 2020, the experts instructed by Dr Freeman's representatives and the GMC to produce a joint report for disclosure to the Tribunal, outlining areas of agreement / disagreement, in order to allow the Tribunal to make an informed decision as to how to proceed with the doctor's evidence.

f. The GMC is hereby also given the discretion to instruct a second expert (namely, a forensic psychologist) to examine Dr Freeman during the week commencing 21 September 2020, and to produce a report on the doctor's mental health for disclosure by no later than 25 September 2020, if the GMC's instructed forensic psychiatrist considers that such a report would be helpful in his assessment of Dr Freeman. If the GMC exercises that discretion, it will disclose to Dr Freeman's representatives the reason why their first expert considers a report from a second expert would be helpful, whereupon Dr Freeman will be made available to undergo a medical examination by that second expert.

g. The planned medical examinations of Dr Freeman should be limited to those detailed above.

h. Dr Freeman's representatives to disclose to the GMC by 11 September 2020 the following:

   i. A redacted copy of the statement of the journalistic 'source', referred to by Dr Freeman's counsel in the course of her submissions on the 06 December 2019 (as discussed in §24-27 of GMC's skeleton argument of 13 August 2020);

   ii. A further signed witness statement from Dr Freeman relating to any additional evidence upon which he wishes to rely. Insofar as there remain issues outstanding at the time of its disclosure by 11 September 2020 (for example, if Dr Freeman still awaits the outcome of other enquiries), the Tribunal directs that an additional further witness statement from Dr Freeman should be disclosed as soon as possible thereafter addressing those outstanding matters;

   iii. A signed witness statement from each factual witness upon whose evidence they wish to rely;

   iv. All reports and the CV of any expert(s) upon whose evidence they intend to rely. (The Tribunal notes Ms O' Rourke's indication today that there is no current intention to serve any expert evidence. The Tribunal directs that if this intention changes, Dr Freeman's representatives must notify the GMC immediately.)

   v. Any document relating to the allegation upon which they wish to rely.

i. Dr Freeman's representatives to serve upon the GMC a written skeleton argument by 25 September 2020 setting out the basis of any application to admit evidence under Rule 34(1) and the basis for any special measures application.

j. The GMC to serve upon Dr Freeman's representatives a written skeleton argument by 2 October 2020 in response to point (i).

k. The skeleton arguments at points (i) and (j), together with any evidence arising out of the directions above, and any evidence arising out of the Directions issued on 17 December 2019, to be supplied to the MPTS in order that they are available for the Tribunal by 5 October 2020.

l. The Tribunal orders that a transcript of today's hearing to date is produced and made available by 5 October 2020.

m. Finally, in response to an application today by Mr Jackson for a further case management/ directions hearing, the Tribunal has today listed a further preliminary hearing for 25 September 2020. As today, this hearing will take place virtually via Skype for Business. In preparation for the additional hearing, the GMC is directed to serve upon Dr Freeman's representatives a written skeleton argument by 14 September 2020, and Dr Freeman's representatives to respond with a written skeleton argument by 21 September 2020. Should this further hearing no longer be required (for example, if all directions have been met and parties are in agreement), both parties are required to inform the MPTS at least 48 hours in advance of 25 September 2020 so appropriate cancellations can be made.

9. That concludes today's hearing.

ANNEX K – 14/10/20
Application under Rule 41 for part of Dr Freeman's evidence to be heard in private

1. Mr Jackson, on behalf of the GMC, made an application under Rule 41 of the Rules for Dr Freeman's evidence relating to riders to be heard in private. He requested that, following the conclusion of that part of Dr Freeman's evidence, the Tribunal should then make a direction, under Rule 16 of the Rules, for transcripts to be obtained. Once these had been checked by the parties, he submitted they could be released to the public/press in attendance.

Submissions

2. On behalf of the GMC, Mr Jackson submitted that there is an obvious and important public interest that this hearing is held in public wherever possible. Equally, he submitted that Dr Freeman's rider patients were entitled to have the confidentiality of medical history and medical records preserved, and that there was a real and legitimate risk of accidental disclosure.

3. Consequently, he stated that these concerns could be fairly addressed by excluding the public during the hearing of the evidence in relation to rider's test results, but then allowing reporting of this evidence once a transcript has been checked by parties to ensure that there has been no inappropriate disclosure.

4. Mr Jackson submitted that this proposal has the added utility of ensuring that Dr Freeman has the freedom to give evidence about individual riders in the knowledge that he can do so without risking disclosing potentially identifying aspects of a rider's health.

5. On behalf of Dr Freeman, Ms O'Rourke did not disagree with Mr Jackson's submissions. She stated that it is important that Dr Freeman is able to give his evidence uninhibited. She submitted that it is a matter for the Tribunal as to whether Dr Freeman's evidence should be heard in private and a direction made to provide redacted copies of the transcripts to the public/press.

Tribunal's Decision

6. The Tribunal had regard to Rule 41 of the Rules, which states:

Attendance of the public

41.

(1) Subject to paragraphs (2) to (6) below, hearings before the Committee and a Medical Practitioners Tribunal shall be held in public.

(2) The Committee or Medial Practitioners Tribunal may determine that the public shall be excluded from the proceedings or any part of the proceedings, where they consider that the particular circumstances of the case outweigh the public interest in holding the hearing in public.

(3) Subject to paragraphs (4) to (6), the Committee or a Tribunal shall sit in private, where they are considering-
(a)…

(b) the physical or mental health of the practitioner.

(4)…

(5)…

(6) Subject to paragraph (5), the Committee or Tribunal may, where they are considering matters under paragraph (3)(a) or (b), hold a hearing in public where they consider that to do so would be appropriate, having regard to-

(a)…
(b) the interests of any patient concerned;
(c)…
(d) all the circumstances, including the public interest.

(7)…

7. The Tribunal determined that, where Dr Freeman refers to a rider's health and medical history, this evidence should be heard in private.

8. However, it noted that it had not been provided with an objective basis why any other part of Dr Freeman's evidence relating to riders should be heard in private session. Absenting this, it determined that - other than where Dr Freeman wished to make reference to a rider's health/medical history - his evidence in relation to riders should be heard in public.

9. Finally, the Tribunal accepted that it has the power, under Rule 16 of the Rules, to make Case Management directions. Nevertheless, it was not persuaded that it should make a direction for a redacted transcript of those parts of evidence heard in private to be made available for the public/press.

ANNEX L – 03/11/2020
Application to admit additional documentation

1. The Tribunal considered Mr Jackson's application that he should be permitted to put additional documentation, newly disclosed today (three items which became C47, C48 and C49), to Dr Freeman in cross examination.

2. On behalf of Dr Freeman, Ms O'Rourke opposed the application.

3. Furthermore, she made her own application that no additional 'new' documentation (i.e. documentation that had not previously been disclosed to Dr

Freeman and his legal team to this point) should be put to her client in cross examination.

Submissions

4. Mr Jackson submitted that the GMC were entitled to continue investigating the case whilst Dr Freeman is giving his evidence.

5. He submitted that the three items arose out of evidence recently given by Dr Freeman under cross examination, and said (in terms) that they were relevant both to the issue of the doctor's truthfulness to the Tribunal and the extent to which, at or around the time he ordered the Testogel, Dr Freeman's position appeared to vacillate in his professed adherence to appropriate rules and standards. As such, Mr Jackson submitted that these were relevant documents that he was entitled to put to Dr Freeman, and that no unfairness would be occasioned by doing so.

6. Ms O'Rourke stated that these documents were not relevant to the outstanding charges in this case.

7. More, she went on to submit that the GMC should not be allowed to put any additional 'new' documentation to her client. In this regard, she stated that Dr Freeman had been giving evidence since 6 October 2020 and referred to Dr Freeman's comment that he now feels as if he is being *'ambushed'* by the GMC. She told the Tribunal that the GMC had introduced over twenty additional documents since Dr Freeman's evidence had commenced and that she has been unable to take any instructions on these from Dr Freeman. She submitted that the GMC had had enough time to prepare its case in advance and that, while she had taken a pragmatic approach to this development until now, *'enough was enough'* and the process was becoming oppressive.

The Tribunal's decision

8. The Tribunal took account of the submissions received and deliberated as to the relevance of the additional information.

9. The Tribunal reminded itself that its overriding objective was to ensure the case was dealt with fairly, justly and impartially. Taking into account the Rules, the Tribunal was satisfied it was entitled to form its own conclusions as to what material was relevant and in due course upon the appropriate weight (if any) to attach to it.

10. The Tribunal determined that the three documents the GMC now wanted to put to Dr Freeman contained information that bore directly upon testimony Dr Freeman had given during cross-examination, testimony which had related to material already before the Tribunal. More, for the reasons advanced by Mr Jackson, the Tribunal was satisfied those documents were relevant, and it did not consider

there would be any unfairness to Dr Freeman in having those matters put to him. Therefore, the Tribunal directed that Mr Jackson was permitted to put these documents to Dr Freeman.

11. On the wider point submitted by Ms O'Rourke (i.e. that henceforth no further 'new' documentation should be put to her client in cross examination); here the Tribunal had some sympathy with Dr Freeman's position.

12. While the reason for Dr Freeman's length of time under cross examination reflected, in part, the shorter working days and four-day weeks necessitated by his health (coupled with computer checks he had wished to undertake, various non-sitting days, and other case management issues that had arisen); nevertheless, the number of days over which he had given evidence had been greater than anticipated. A contributory factor to this had been the number of new documents the GMC had recently, and incrementally, produced.

13. The Tribunal reminded itself that both parties had received a great deal of time to prepare their cases. In terms of the GMC and its ongoing trawl through unused material, the Tribunal had no indication when this was likely to end, nor how much further material (if any) it might generate which, at some unspecified date, Mr Jackson might then wish to put to Dr Freeman.

14. Conscious of its case management responsibilities, the Tribunal wished to see matters proceed fairly and justly, but also with appropriate expedition. In this regard, it reminded itself of the commentary on case management in the criminal case of *R v. Jisl, Tekin and Konakli [2004] EWCA Crim 696* :

> *'114. The starting point is simple. Justice must be done. The defendant is entitled to a fair trial: and, which is sometimes overlooked, the prosecution is equally entitled to a reasonable opportunity to present the evidence against the defendant. It is not however a concomitant of the entitlement to a fair trial that either or both sides are further entitled to take as much time as they like, or for that matter, as long as counsel and solicitors or the defendants themselves think appropriate. Resources are limited … Time itself is a resource … It follows that the sensible use of time requires judicial management and control.'*

15. Accordingly, the Tribunal determined the following.

16. It was not prepared to direct that, going forward, the GMC could not put any additional newly disclosed documentation to Dr Freeman in cross examination. It would depend upon the nature of that documentation, its relevance, and whether it would be fair and just for such documentation to be put to this doctor. The Tribunal therefore rejected Ms O'Rourke's submission in this regard.

17. Nevertheless, the Tribunal wished to emphasise that, for the remainder of its cross-examination of Dr Freeman, it would expect the GMC to rely centrally upon the materials already before us. Therefore, insofar as the GMC might apply to put further 'new' documents to Dr Freeman, it will need to provide the Tribunal with very persuasive reasons, in terms of relevance and fairness, before the Tribunal accedes to such an application.

ANNEX M – 03/11/2020
Determination on hybrid hearing

1. The Tribunal told parties that it had received an email from the MPTS setting out its position in light of the current coronavirus lockdown. The Tribunal noted that, during the period of national restrictions, MPTS hearings would be held virtually unless there is a particular need for a hearing to be held at the MPTS hearing centre ('hearing centre'). Where the needs of the participants could not be met by a virtual hearing or where the circumstances of the case made it unsuitable for a virtual hearing, the hearing could though continue to be held at the hearing centre.

2. Bearing in mind the preference previously expressed by Dr Freeman himself, as well as previous submissions by the parties, the Tribunal indicated that it was content for the hearing to run as a hybrid hearing whilst Dr Freeman is still giving his evidence. This gave people the option to either attend the hearing centre or to take part in the hearing remotely. The Tribunal noted, for completeness, the MPTS email allowed for the possibility of adjourning cases to later dates.

3. The Tribunal invited submissions from parties on the issue generally.

Submissions

4. On behalf of the GMC, Mr Jackson submitted that the GMC would oppose an adjournment at this stage of the hearing. He submitted that it is a matter for the Tribunal as to how it should proceed but the GMC would be content with a hybrid hearing or a virtual hearing.

5. On behalf of Dr Freeman, Ms O'Rourke also opposed the possibility of adjourning this case. She submitted that Dr Freeman has been giving evidence for over four weeks and stated that he should be allowed to complete his evidence at the hearing centre. She submitted that it would be Dr Freeman's preference to continue attending the hearing centre whilst he is still giving his evidence. She submitted that Dr Freeman would not oppose continuing the hearing as a hybrid hearing until the completion of his evidence. Ms O'Rourke accepted that the hearing could proceed as a virtual hearing following the conclusion of Dr Freeman's evidence.

The Tribunal's decision

6. The Tribunal took account of the submissions received from Mr Jackson and Ms O'Rourke.

7. The Tribunal was content for the hearing to proceed as a hybrid hearing until Dr Freeman completed his evidence. Thereafter, it determined that the hearing would continue as a virtual hearing until further notice.

ANNEX N – 18/11/2020
Application to admit additional documentation

1. During his cross-examination of Dr Freeman, Mr Jackson sought permission to put questions to the witness based upon the contents of a document that had not been introduced into evidence.

Submissions

2. Mr Jackson wished to ask Dr Freeman questions based on the contents of an article in a weekly newspaper, The Sunday Times. He submitted that, during Ms O'Rourke's re-examination of Dr Freeman, she had put the contents of various other articles to Dr Freeman and had asked Dr Freeman questions in relation to these.

3. On behalf of Dr Freeman, Ms O'Rourke objected to Mr Jackson's application. She stated that this article was scurrilous, based on hearsay, and more prejudicial than probative. She invited the Tribunal to reject Mr Jackson's application and to do so without seeing the article itself.

The Tribunal's determination

4. The Tribunal noted that, in relation to the newspaper articles Ms O'Rourke had earlier introduced, there had been no argument raised by Mr Jackson. Consequently, it had not been asked to reach a determination in those regards.

5. In going on to consider Mr Jackson's application, the Tribunal did so in two stages.

6. First, it determined that, in order for it to assess whether the material could be put to the witness, the Tribunal would need to have sight of the article. The Tribunal reminded itself that, as a professional panel, it could properly be expected to put out of its mind and to attach no weight to any material it may hold to be inadmissible or irrelevant and prejudicial (*R (Mahfouz) v The Professional Conduct Committee of the General Medical Council* [2004] EWCA Civ 233 per Carnwath LJ at §23-4.)

7. Having then considered the article, the Tribunal determined that it was more prejudicial than probative and that it would not be fair to allow questions to be put to the witness on the basis of its contents.

8. Consequently, the Tribunal rejected Mr Jackson's application. For its part, the Tribunal put from its mind and attached no weight to the material.

ANNEX O – 22/01/21
Application for adjournment

Background

1. Dr Freeman's hearing was listed to reconvene, via Skype for Business, on 22 January 2021 to hear parties closing submissions on facts.

2. On 15 January 2021, a MPTS Case Manager received an application on behalf of Dr Freeman for the case to be adjourned. The was on the basis that Dr Freeman was due to assist in the Covid-19 vaccination programme and had been asked by his employers not to take leave to attend the hearing. He wished to attend to hear, and to instruct his legal team on, those submissions.

3. The GMC opposed the proposed adjournment on the basis that Dr Freeman had had the opportunity to provide instructions on closing submissions to his representatives since the hearing last adjourned. Furthermore, the GMC stated that Dr Freeman would receive a copy of the GMC's written submissions which he could read and have the opportunity to provide further instructions to his representatives upon. In the circumstances, his right to a fair hearing would not be prejudiced.

4. The Case Manger refused the adjournment request attaching weight to the fact that Dr Freeman could be provided with a copy of the written submissions. The Case Manager considered that the public interest and the interests of both parties would be best served by the hearing proceeding as scheduled.

5. The Case Manager's decision and a copy of parties' submissions were provided to the Tribunal on the 22 January 2021.

6. Ms O'Rourke has now made an application, under Rule 29(2) of the Rules, for adjournment of the hearing. Rule 29(2):

> *"Where a hearing of which notice has been served on the practitioner in accordance with these Rules has commenced, the Committee or Tribunal considering the matter may, at any stage in their proceedings, whether of*

their own motion or upon the application of a party to the proceedings, adjourn the hearing until such time and date as they think fit."

Submissions

7. On behalf of Dr Freeman, Ms O'Rourke told the Tribunal that Dr Freeman had instructed her to renew the application on the basis that he wished for the adjournment request to be before the Tribunal. Ms O'Rourke explained that the application that she was instructed to make is essentially an 'open-ended' application to adjourn to an unspecified date. Ms O'Rourke informed the Tribunal that she had explained the difficulties of this application to Dr Freeman. Nevertheless, Dr Freeman wanted her to explain to the Tribunal that he feels compelled by his duty in the current Covid-19 crisis to be where he is today; namely, giving vaccinations to people. He wanted the Tribunal to understand that he wished to be present today to hear the closing submissions in relation to the facts stage of this case and any other matters arising.

8. On behalf of the GMC, Mr Jackson opposed this application. He submitted that Dr Freeman should and could participate in the hearing notwithstanding his current professional duties (i.e., assisting in the NHS response to the current pandemic). He submitted that Dr Freeman could participate effectively in this stage of the hearing by logging in remotely, if his duties permitted this. He also reminded the Tribunal that Dr Freeman would have the written submissions on facts and that he could be updated at every break by his solicitors.

Tribunal's Decision

9. The Tribunal had regard to Rule 29(2) of the Rules, as quoted above, the documents placed before it and the submissions from both parties.

10. In all the circumstances, the Tribunal determined that it would not be appropriate or proportionate to adjourn the case to an unspecified date. The Tribunal considered that Dr Freeman's representatives would be able to provide their client with the written submissions and that, additionally, he would have the opportunity to have further discussions with them at various times across the hearing days set aside for these submissions, should he so wish.

11. Therefore, the Tribunal agreed with the Case Manager's decision that the public interest and the interests of both parties would be best served by the hearing proceeding as scheduled.